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In The

Supreme Court of the United States

October Term, 1990

AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, NATIONAL ASSOCIATION OF COLLEGE STORES, INC., GEORGIA RETAIL ASSOCIATION, ARNOLD BOOKSTORES, INC., OXFORD BOOKS, INC. and STUART C. WOODS,

Petitioners,

v.

JAMES WEBB, etc. et al.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, after the Georgia Supreme Court refused to adopt a "narrowing construction" of a Georgia criminal statute which sharply restricts the access of adults and older juveniles to First Amendment protected books and periodicals, a federal court can nevertheless adopt narrowing constructions for which there are no factual support, based in part on a construction previously given by the Virginia Supreme Court to a Virginia statute.

2. Whether *Pope v. Illinois*, 481 U.S. 497 (1987), a case dealing with adult obscenity, supports an interpretation of a Georgia statute governing constitutionally protected materials so that "if any reasonable minor, including a seventeen-year-old, would find serious value" in the material, the material may not be regulated as "harmful to minors," even if such interpretation emasculates Georgia's policy of protecting younger children from "harmful" materials.

3. Whether the Georgia statute's impact on fundamental rights requires the application of a "strict scrutiny" test to determine whether the provision of the Georgia statute exempting certain libraries from compliance with the statute, while subjecting all others displaying "harmful to minors" material to criminal enforcement and a First Amendment chilling effect, and thus whether the statute violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The appellants in the court of appeals, all of whom are petitioners in this Court, were:

The American Booksellers Association, Inc., the major national trade association of booksellers. The Association has approximately 4,400 members, including chain bookstores, private bookstores and department store bookstores. Its members account for more than 80% of all sales of books of general interest by booksellers nationwide. The Association has members located in Georgia, including appellants Arnold Bookstores, Inc. and Oxford Books, Inc.

The Association of American Publishers, Inc., the major national trade association of publishers of general books, textbooks and educational materials. The Association has approximately 235 members, consisting of most of the major commercial book publishers in this country, and many smaller and non-profit publishers, including university presses and scholarly associations. The books published by the Association's members are sold throughout the United States, including Georgia, at bookstores, department stores, supermarkets, drugstores, newsstands, and other outlets.

The Council for Periodical Distributors Associations, the national trade association for more than 380 independent local wholesale distributors of magazines, paperback books and newspapers. Its members are located and do business in every state of the United States, including Georgia.

PARTIES TO THE PROCEEDING – Continued

The National Association of College Stores, Inc., a trade association comprising approximately 2,800 college and university bookstores located throughout the United States, including Georgia. Its members represent more than 95% of the higher education retail market for books.

The Georgia Retail Association, a retailers trade association, having approximately 500 members in Georgia. Its members include drugstores, food stores, bookstores and department stores which sell newspapers, magazines and paperback books.

Arnold Bookstores, Inc., a general retail bookstore located in DeKalb County, Georgia.

Oxford Books, Inc., a general retail bookstore located in Fulton County, Georgia.

Stuart C. Woods, a freelance professional writer residing in Fulton County, Georgia, whose books have been distributed and sold in Georgia.

The respondents are James Webb, Leroy Stynchcombe, Clinton Chafin, George Napper, Ralph Bowden, Pat Jarvis, Col. R. T. Burgess, Ed Matthews, Herbert A. Rivers, Bill Hutson and Bob Hightower (and their successors in office).

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OPINIONS BELOW

The initial opinion of the United States District Court for the Northern District of Georgia, dated June 27, 1984, enjoining enforcement of the minors' access provision of the Amendment but abstaining from final decision of the federal constitutional issues, is reported at 590 F. Supp. 677 (N.D. Ga. 1984) and is reproduced as Appendix 1 (A-1). Plaintiffs appealed the district court's decision to abstain to the Eleventh Circuit, which granted a joint motion by the parties to certify questions to the Georgia Supreme Court relating to the multiple subject matter prohibition of the Georgia Constitution and the construction to be given to the minors' access provision, which certification is reported at 744 F.2d 784 (11th Cir. 1984) and is reproduced as Appendix 2 (A-38).

The decision of the Georgia Supreme Court finding that the Amendment did not violate the multiple subject matter prohibition of the Georgia Constitution, but refusing to answer the second certified question relating to the construction to be given to the Amendment, is reported at 254 Ga. 399, 329 S.E.2d 495 (1985). The portion of the opinion relating to construction of the Amendment is reproduced as Appendix 3 (A-44).

The district court opinion issued on September 26, 1986, declaring the minors' access provision and the library exemption of the statute unconstitutional, is reported at 643 F. Supp. 1546 (N.D. Ga. 1986) and is reproduced as Appendix 4 (A-48).

A supplemental order of the district court, entered on February 25, 1987, ruling that the library exemption was

not severable from the definition, exhibition and distribution provisions in the statute, is reported at 654 F. Supp. 503 (N.D. Ga. 1987) and is reproduced as Appendix 5 (A-73).

The opinion of the Court of Appeals for the Eleventh Circuit, reversing the judgment of the district court, is reported at 919 F.2d 1493 (11th Cir. 1990) and is reproduced as Appendix 6 (A-77). On March 13, 1991, the court of appeals denied plaintiffs rehearing or rehearing in banc. See Appendix 7 (A-126).

JURISDICTION

This action, arising under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202, and the First, Fifth and Fourteenth Amendments to the United States Constitution, challenged the constitutionality of new and revised §§ 16-12-102 through 16-12-104 of the Georgia Code Annotated (the "Amendment"). The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331, 1343(3) and 1343(4).

Jurisdiction of the Supreme Court of the United States to review by certiorari the court of appeals' reversal of the district court judgment is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ga. Code Ann. § 16-12-102 Definitions.

> As used in this part, the term:
>
> (1) "Harmful to minors" means that quality of description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> > (A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;
> >
> > (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

(2) "Knowingly" means having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(A) The character and content of any material described in this part which is reasonably susceptible to examination by the defendant; and

(B) The age of the minor; provided, however, that an honest mistake shall constitute an excuse from liability in this part if the defendant made a reasonable, bona fide attempt to ascertain the true age of such minor.

(3) "Minor" means a person less than 18 years of age.

(4) "Sadomasochistic abuse" means actual or simulated flagellation or torture by or upon a person who is nude, clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained by one so clothed or nude.

(5) "Sexual conduct" means actual or simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such be female, breasts.

(6) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(7) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Ga. Code Ann. § 16-12-103. Selling, loaning, or exhibiting.

(a) It shall be unlawful for any person knowingly to sell or loan for monetary consideration or otherwise furnish or disseminate to a minor:

> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or
>
> (2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

(b) It shall be unlawful for any person knowingly to sell or furnish to a minor an admission ticket or pass or knowingly to admit a minor to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors or exhibit any such motion

picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by minors not admitted to any such premises.

(c) It shall be unlawful for any minor falsely to represent to any person mentioned in subsection (a) or subsection (b) of this Code section or to his agent that such minor is 18 years of age or older with the intent to procure any material set forth in subsection (a) of this Code section or with the intent to procure such minor's admission to any motion picture, show, or other presentation, as set forth in subsection (b) of this Code section.

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) of this Code section or to his agent that he is the parent or guardian of any minor or that any minor is 18 years of age or older with the intent to procure any material set forth in subsection (a) of this Code section or with the intent to procure such minor's admission to any motion picture, show, or other presentation, as set forth in subsection (b) of this Code section.

(e) It shall be unlawful for any person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment or at any other public place frequented by minors or where minors are or may be invited as part of the general public:

> (1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which

> depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or
>
> (2) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

Ga. Code Ann. § 16-12-104. Library exception.

The provisions of the Code Section 16-12-103 shall not apply to any public library operated by the state or any of its political subdivisions nor to any library operated as a part of any school, college, or university.

STATEMENT OF THE CASE

This case is about freedom of speech in its most fundamental aspect – about the right of the people to display and sell, and to peruse and buy, books and magazines and newspapers. It raises the question whether government is free to impose severe restrictions on the rights of adults to access to materials that may be deemed "harmful to minors" and whether a federal court may override a decision of the highest court of a state not to narrowly construe a statute.

On April 5, 1984, the Governor of Georgia signed an Act which amended Georgia's obscenity laws and, among other things, imposed criminal penalties on any person

who knowingly exhibits, exposes or displays at any business or commercial establishment or other public place where minors are or may be invited any material not obscene as to adults, but which may be deemed "harmful" to minors (the "Amendment").[1] 1984 Ga. Laws 1495, Ga. Code Ann. §§ 16-12-102, *et seq.* The Amendment became effective on July 1, 1984.

The day following the Governor's signing of the Act, this action was commenced by a group of plaintiffs who either are themselves, or who represent, authors, publishers, wholesalers, retailers and distributors of books, magazines or newspapers in the State of Georgia and, in particular, Cobb, DeKalb, Fulton, Gwinnett and Whitfield Counties. The bringing of this action reflected plaintiffs' concerns as to the constitutionality of the Amendment because of its apparent application in unconstitutionally preventing adults and older juveniles from gaining access to the First Amendment-protected material in which plaintiffs trade.

Trial on the merits was consolidated with the hearing on plaintiffs' motion for preliminary injunction. Plaintiffs presented substantial evidence to support their constitutional challenges to the Amendment. Defendants, although arguing to the court of appeals that it should reverse the trial court's findings of fact, presented no evidence in the trial court controverting the material evidence submitted by plaintiffs.

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[1] A marked version of the relevant statutes, showing the changes, is found in the Appendix to the initial district court opinion (A-33 through A-37).

Plaintiffs' witnesses included the owner/managers of two independent general bookstores (Frank James McGuire and Donald Howard Arnold), a leading author of novels addressed primarily to teenagers (Norma Klein), the Vice President/General Counsel of Bantam Books, Inc. (Heather Grant Florence), the Chairman of the English Department at Woodward Academy, a private elementary and secondary school (Bobby West Alford), and a leading Southern author of best-selling works such as *The Great Santini* and *The Lords of Discipline* (Patrick Conroy).

Plaintiffs presented evidence as to the real and immediate problems encountered by sellers of communicative materials in complying with the Amendment.

The district court initially enjoined enforcement of the minors' access provision of the Amendment. However, it abstained from final decision of the federal constitutional issues so that the Georgia state courts would have the opportunity of construing and narrowing the language at issue. *American Booksellers Ass'n., Inc. v. Webb,* 590 F. Supp. 677 (N.D. Ga. 1984). Plaintiffs appealed the district court's decision to abstain to the Eleventh Circuit, which granted a joint motion by the parties to certify questions to the Georgia Supreme Court relating to the multiple subject matter prohibition of the Georgia Constitution and the construction to be given to the minors' access provision. *American Booksellers Ass'n., Inc. v. Webb,* 744 F.2d 784 (11th Cir. 1984).

In response to the first certified question, the Georgia Supreme Court found that the statute did not violate the

multiple subject matter prohibition of the Georgia Constitution. However, the Court refused to answer the second certified question relating to the construction to be given to the Amendment. *American Booksellers Ass'n., Inc. v. Webb*, 254 Ga. 399, 329 S.E.2d 495 (1985).

The district court then issued its ruling declaring the minors' access provision and the library exemption of the statute unconstitutional. *American Booksellers Ass'n., Inc. v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986). The district court found that the minors' access provision reached a significant percentage of an average bookstore's inventory and a predominant amount of all adult reading material. (A-54, A-55.) The court further found that the statute would substantially impair booksellers' business and impede adult access to constitutionally protected material. (A-56.) The court also found that the library exemption did not further a substantial governmental interest, and thus could not withstand equal protection analysis. (A-69, A-70.)

In a supplemental order entered on February 25, 1987, the district court ruled that the library exemption was not severable from the definition, exhibition and distribution provisions in the statute. *American Booksellers Ass'n., Inc. v. Webb*, 654 F. Supp. 503 (N.D. Ga. 1987). Therefore, because the library exemption had been ruled unconstitutional, the district court found that the entire statute must fall. The district court entered a judgment enjoining enforcement of the statute as a whole, but stayed the injunction as to the definition, exhibition and distribution provisions pending appeal to the court of appeals.

On December 27, 1990, a panel of the Eleventh Circuit court of appeals (Chief U.S. District Judge Sam C. Pointer, Jr. dissenting as to the construction of the display requirement) reversed the judgment of the district court. The majority of the panel ruled that the minors' access provision did not violate the First Amendment because (a) material is not "harmful to minors" for purposes of the statute unless it lacks serious value for all minors, even mature seventeen-year-olds; and (b) placing materials behind blinder racks constitutes compliance with the display provision. The court of appeals also held that the library exemption should be examined under the "rational basis" standard and that, under such standard, it is not constitutionally infirm.

On March 13, 1991, the Eleventh Circuit denied petitioners rehearing or rehearing in banc.

ARGUMENT

The district court found that the Georgia minors' access law, while perhaps intended only to restrict minors' access to material deemed "harmful" to them, has the collateral effect of unreasonably restricting adults' access to a vast array of constitutionally protected material, as well as the access of older juveniles to material not "harmful" as to them. It is, simply put, impossible for a bookseller to prohibit juvenile access to works "harmful" to them while, at the same time, making these works available to adults and to juveniles for whom they are not "harmful." This finding was based on the extensive uncontradicted evidence presented at the hearing.

The minors' access provision criminalizes the public placement of "harmful to minors" material containing sexually explicit content. The provision by its terms imposes on booksellers the obligation to deny completely juvenile access to proscribed material without providing any meaningful guidance as to what material is encompassed within its prohibition. The Georgia Supreme Court refused to construe the Amendment under state law, and thus refused to create a narrower meaning to the statute than is apparent on its face.

Because of the difficulties a bookseller faces in complying with the statutory proscription, a bookseller is likely to err on the side of caution. The chilling effect the minors' access provision creates infringes the First Amendment rights of adults, older juveniles, authors, publishers, distributors and retailers, and renders the statute facially invalid.

The overall thrust of the court of appeals reversal was to find narrowing constructions for various provisions of Ga. Code Ann. §§ 16-12-102 and 16-12-104 which the Georgia Supreme Court had refused to find, which are not drawn from either the language or history of the Amendment, and which, simply put, are not reasonable. The court of appeals in effect acted as if it were the Georgia Supreme Court, creating state law despite the Georgia Supreme Court's reluctance and refusal to do so.[2] While the court of appeals paid lip service to the basic tenet that narrowing constructions will be recognized

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[2] Nor is the Eleventh Circuit's construction binding on the Georgia court. *Bauer Int'l Corp. v. Cagle's, Inc.*, 225 Ga. 685, 686, 171 S.E.2d 314, 317 (Ga. 1969) (Georgia Supreme Court not bound by federal court of appeals construction of Ga. long-arm statute).

only if the statute is "readily susceptible" to such limitations (*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268 (1975); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987, 998 (D. Utah 1982); L. Tribe, *American Constitutional Law*, 1032 n.4 (2d ed. 1988)), a careful examination of the "constructions" applied reveals a wholesale revision of the Amendment to force it to conform to constitutional requirements. As the dissenting judge in the court of appeals stated, "the majority, under the rubric of interpreting or construing the statute, have simply rewritten it" (A-125).

Petitioners respectfully submit that the court of appeals, by in effect overruling the Georgia Supreme Court, misperceived its role in the federal system as set forth in the decisions of this Court.

I. The Court of Appeals' Gloss On The Statute's "Harmful To Minors" Definition Is An Impermissible Re-Writing Of The Language Used By The Georgia Legislature.

Throughout this litigation, the parties have argued that two diametrically opposed standards should apply to the "literary value" of the third prong of the "harmful to minors" test found in Ga. Code Ann. § 16-12-102. Plaintiffs have argued that a facial reading of the statute leaves no possible interpretation but that, if material is deemed harmful to *any* minor, it must be deemed harmful as to all minors.[3] Stated differently, a work that would be

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[3] Ga. Code Ann. § 16-12-102(3) defines "Minor" as a "person less than 18 years of age."

harmful to a ten-year-old must be withheld from access by all minors, even though it would have recognized value for a seventeen-year-old. This is the result envisioned by the statutory scheme approved in *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274 (1968).

Defendants, on the other hand, have argued that the statute should read to permit application of a lesser standard of obscenity for minors: if material would have value for any minor, the proscriptions of the statute would not apply. In other words, a work having value to a seventeen-year-old remains protected even though it could be deemed harmful to a ten-year-old.

These opposing views of legislative intent and statutory construction present a true Hobson's choice, as the same definition of "harmful to minors" applies to both the sale and display prohibitions of the Act. That is, if literary value is to be judged only with reference to what is suitable for older minors, the display provision becomes less onerous, but sexually explicit materials may be freely sold to ten-year-olds even though such materials may be indisputably harmful to them. The other alternative is to construe the literary value test as applying to most minors, including younger ones, in which case the State's interest in preventing the sale of harmful materials to younger children is upheld but the display provision becomes unduly restrictive of adults' access to constitutionally protected materials.

Finding that questions of legislative intent should be answered in the first instance by the Georgia courts, the

district court abstained from deciding the constitutionality of the Act. Defendants then advanced their narrowing constructions to the Georgia Supreme Court, which specifically declined to adopt them. In view of this failure of the Georgia courts to narrow the scope of the Act, the trial court correctly construed the plain language of the Act and held that "minor" meant any person under the age of 18 and, thus, the literary value of materials must be judged in view of the maturity and literary comprehension of most minors, including younger ones.

The court of appeals disagreed, however, and held that material was "harmful to minors" only if it was unsuitable for the oldest of minors. In doing so, the court of appeals applied inapposite law, ignored the clear intent of the Georgia legislature, and rewrote a state statute even after the Georgia Supreme Court made it clear that it was unwilling to do so.

The language of the statute is unambiguous and not susceptible to federal court revision: "minor" means *any* person under the age of 18. Ga. Code Ann. § 16-12-102 (3). That the Georgia legislature crafted this definition with precision is obvious since this definition varies from that in Georgia's prior obscenity statute, which defined "minor" as one under the age of 16. Applying the logic of the court of appeals opinion, the Georgia legislature, when it raised the age of majority from 16 to 18, intended to *increase* the amount of sexually explicit material made available to children. Without doubt, this is the opposite of what the Georgia legislature thought it was doing.

For the court of appeals, contrary to the Georgia Supreme Court, to read into the statute a strained

construction which "dramatically decreases the amount of material covered by the ban on display" (A-103) is an impermissible rewriting of the plain language used by the Georgia legislature. Since the Georgia Supreme Court declined to give a narrowing interpretation of the Act, judicial restraint, not a rewriting of the statute, is required:

> For this Court to "introduce words of limitation" into an overbroad criminal statute in order to render it constitutional "would to some extent, substitute the judicial for the legislative department. . . . To limit this statute . . . would be to make a new law, not to enforce an old one. This is no part of our duty."

Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 998 (D. Utah 1982) (citations omitted). As this Court stated when faced with a statute similar to Georgia's, "we will not rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

The court of appeals' view of the scope of the statute's proscription utterly ignores the asserted legislative intent in its enactment. The court of appeals in effect created a duplicative and meaningless statute which encompasses little or nothing more than that covered by Georgia's general obscenity laws. The Georgia legislature did not intend to enact a statute having no real meaning and application. Nor, have defendants so contended. Rather, defendants' papers in the lower courts in support of the State's interest in protecting minors have been replete with references to the harms resulting from exposure to pornography *"at an early age"* or in early adolescence. [Appellants' brief in the court of appeals ("Appt.

Br."), pp. 18-19 (emphasis added)]. Defendants even referred to a statement in the *Final Report*, Attorney General's Commission on Pornography 185-86 (1986), that *"those in the early adolescent age groups might be the most susceptible and the least capable of managing social and psychological dilemma produced by exposure to pornography."* [Appt. Br., pp. 18-19 (emphasis added)]. The court of appeals' opinion, however, abandons the State's interest in protecting these younger adolescents in favor of an overly restrictive definition of "harmful to minors."

The court of appeals' error in construing the Act is caused in part by its failure to distinguish between the "sale" and the "display" of material (discussed in Part II below) and in part by its improper reliance on this Court's decision in *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439 (1987). In *Pope*, the Court construed a test for *adult* obscenity. Justice White noted that "[t]he proper inquiry is not whether an ordinary member [of the community] would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." 481 U.S. 497, 500-501. *Pope* thus echoes the fundamental idea, protected by the federal Bill of Rights, that a minority's disfavored expression should not be silenced by the majority's view.

Pope, however, involved an adult obscenity statute. Out of necessity, the law recognizes that adults operate at a basic maturity level and share similar capacities to comprehend literary themes. Minors, on the other hand, vary widely in maturity levels and comprehension. This fundamental distinction makes the holding in *Pope* inapposite to a minor's access provision which on its face

seeks to protect all minors from material which may be "harmful" to them. The application of *Pope* to such a provision renders an absurd result that is wholly at odds with the intent of the Georgia legislature.

In *Hunter v. State*, 257 Ga. 571, 361 S.E.2d 787 (1987), the Georgia Supreme Court reversed the conviction of a defendant under Ga. Code Ann., § 16-12-103(a)(1) on charges of exhibiting to a minor a motion picture depicting sexually explicit nudity. In construing the definition of "harmful to minors" under Ga. Code Ann. § 16-12-102, the Georgia Supreme Court noted that it must be construed in light of this Court's decision in *Miller*. Citing *Pope*, the Georgia Supreme Court noted that the literary value of material must be decided "with reference to whether an 'ordinary member of any given community' would find serious value in the allegedly obscene material." 361 S.E.2d at 789. This statement is not consonant with the holding of the court of appeals that only those on the brink of adulthood constitute the relevant community for determining what is "harmful to minors." Given this pronouncement by the Georgia Supreme Court, there can be little doubt that it would reject, or may have already rejected, the Eleventh Circuit's construction of the literary value test as applying only to what is suitable for a legitimate minority of older minors.

In sum, the only "readily susceptible" construction of the definition of material targeted by the statute is that evident from the text of the statute: material deemed "harmful" to *any* minor. Once the plain language of the statute is recognized, the Amendment strays too far into the realm of protected speech to pass constitutional muster.

II. The Display Provision Likewise Is Not "Readily Susceptible" To The Construction Reached By The Court of Appeals.

The court of appeals has construed Ga. Code Ann. § 16-12-103(e), the display provision, so that the placement of material "harmful to minors" behind "blinder racks" may in some instances satisfy the statute's proscriptions. The court of appeals considered it necessary to create this method of compliance because the Amendment would still be unconstitutional if prohibited works, even if relatively few in number, could not be displayed or made accessible to adults. The "blinder rack" construction, which has no basis in the language of the Amendment which mentions neither blinder racks nor any other compliance measure, is not a "readily susceptible" interpretation of the Act. Once again, the court of appeals adopted an interpretation of the Georgia statute when the Georgia Supreme Court refused to do so.

Section 16-12-103(e) makes it a crime to "display in public at . . . any . . . business or commercial establishment or at any other public place . . . where minors are or may be invited as part of the general public . . . any . . . printed matter . . . which contains any . . . explicit and detailed verbal descriptions . . . of sexual conduct . . . and which, taken as a whole, is harmful to minors." This language on its face does more than simply prohibit the display of materials that are harmful to minors. It seeks to take out of circulation and away from the view of anyone material which *contains* material harmful to minors. It controls the content of what is placed in the marketplace. The mere presence of prohibited materials

on the premises violates the Act. Thus, the display provision goes far beyond the time, manner and place restrictions which have been upheld by other courts.

Chief District Judge Pointer, in his partial dissent, notes that the display provision cannot be saved by imposing the blinder rack construction developed by the majority in the court of appeals. He correctly notes that the only authority relied on by the court of appeals in reaching this result is *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). Yet *Casado* upheld the constitutionality of a city ordinance which contained a specific exemption for materials displayed behind blinder racks; the *Casado* ordinance thus dealt only with visual exposure to the covers of harmful materials, not with the display of materials *containing* material deemed harmful to minors. This obvious and important distinction was overlooked by the court of appeals, and illuminates the absurdity of a judicially written blinder rack provision in Georgia's *content*-focused display provision.

Further, even if the panel's narrowing constructions of the Act "dramatically" reduce its scope, the proscriptions on display still deprive adults of access to these materials. Take the example of a book of explicit Mapplethorpe photographs. A retailer might reasonably be concerned that such a publication might be considered unsuitable for seventeen-year-olds and could not be displayed.[4] Would simply placing the book behind a blinder

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[4] Alternatively, if a retailer reasonably concluded that such a book is not "harmful" to a seventeen-year-old college freshman under the panel's construction of the Act, then is he at

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rack be sufficient compliance with the statute? No! As the court of appeals observed, the retailer must also take steps to "deny minors unfettered physical access to offensive material" (A-108), although the panel declines to "specify the steps that must be taken to assure that the opportunity to browse is eliminated." (A-112, n.32) The retailer is thus left guessing as to how to comply with the display provision, with the result that, to avoid criminal prosecution, he would err on the side of caution by either keeping these materials under lock and key or refusing to stock them altogether. In either case, adult access to protected materials would be unduly restricted. Thus, the statute, even aided by the Eleventh Circuit's revisions, unconstitutionally infringes upon the First Amendment rights of adults.

III. The Court of Appeals Erred In Applying A Rational Basis Test To The Library Exemption And In Finding It Not To Violate The Equal Protection Clause.

The court of appeals' erroneous conclusion with regard to the display proscription led it to also err in

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liberty to display that book on the floor and allow young adolescents to peruse its pages freely without violating the Act? This question is answered "no" by the Georgia legislature, but "yes" by the panel's decision. The criminal exposure for display is a real, substantial and daily event for retailers. By comparison, criminal exposure for sale is easily addressed by retailers judging the buyer and the material. The panel's failure to see the distinction between display and sale prohibitions underscores the error in using a strained interpretation to save the unconstitutional display provision.

ruling the library exemption constitutional. The result of the decision is that, while commercial establishments must attempt to deter minors' access to material that may be deemed "harmful" to them, minors may simply walk into a library to gain unfettered access to that same material.

The court of appeals initially concluded that the validity of the library exemption is to be tested by a "rational basis" standard, rather than the appropriate "strict scrutiny" standard. This conclusion was based on the Eleventh Circuit's ill-conceived ruling that the display proscription does not create a substantial hindrance to adult access to material which is constitutionally protected as to them, and is directly contrary to the law in at least one other circuit. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). *See also, Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985). Had the court of appeals correctly found that the display prohibition violated the First Amendment, it would have been required to apply the strict scrutiny standard and to strike the library exemption as an unconstitutional violation of equal protection. Indeed, the State itself conceded that if the display proscription affects First Amendment protections, strict scrutiny would be applicable and the exemption would be unconstitutional. (Appt. Br., p. 52). This concession is consistent with the numerous cases holding that a governmental regulation which infringes on a fundamental right, such as freedom of speech, must be considered under the strict scrutiny standard. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

The court of appeals relied primarily on *Casado* in deciding to apply the rational basis test. The Tenth

Circuit in that case applied the rational basis test in upholding an exemption for non-commercial enterprises in a statute that specifically required commercial enterprises to display covered material in blinder racks. After legislating into the Georgia statute a "blinder rack" provision, the court apparently found controlling a case construing a statute that explicitly contained such a provision. Since the panel's decision to apply the rational basis test is premised on its act of judicial legislation, its decision must be overturned. In fact, the state itself conceded that the Georgia Act does not exempt non-commercial distributions in the same manner as the ordinance in *Casado*.

The Tenth Circuit's application of the rational basis test in *Casado*, moreover, was ill-conceived and the court of appeal's reliance on it in this case misplaced. The Tenth Circuit failed to recognize that any regulation affecting a fundamental right must be governed by the strict scrutiny standard, regardless of whether the impact on the exercise of that right is considered to be a substantial one or one of only minor significance. As the court in *Upper Midwest Booksellers Ass'n. v. City of Minneapolis*, 602 F. Supp. 1361, 1374 (D. Minn. 1985), *aff'd* 780 F.2d 1389 (8th Cir. 1986) stated in determining that the Tenth Circuit applied the wrong equal protection standard in *Casado*:

> The Supreme Court has held on a number of occasions that the strict scrutiny test is the proper standard whenever government classifies individuals' ability to exercise a fundamental right such as speech. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110,

86 L.Ed. 1655 (1942); *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

The court of appeals ignored this fundamental principle, so often enunciated by this Court, in deciding that after its nonbinding reconstruction of the statute, the impact on petitioners' first amendment rights was not substantial enough to warrant application of the strict scrutiny standard.[5]

The court of appeals' conclusion that the exemption satisfies the rational basis test is also incorrect. In concluding that "the library exemption preserves the accessibility of such material to minors for purely educational purposes," the court of appeals found irrelevant the fact that the exemption is not one focused on "educational uses." Many educational uses of "harmful" materials are still covered by the statute despite the library exemption (e.g., museums, public health facilities, federal and state courtrooms, and school classrooms). Far from irrelevant, the fact that the exemption in no way distinguishes between "educational" and "non-educational" uses does not permit the panel's conclusion that one potentially "educational" use is constitutionally permissible while all others are not.

The court of appeals further found that while the ban on display of "harmful" materials presents a closer equal protection question than that on the sale or loan of such materials, the exemption is rationally related to protecting minors despite its effect on adult access. The court of

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[5] The Eighth Circuit's affirmance in *Upper Midwest* at the least creates a significant disagreement among the courts of appeal, which only this Court can resolve.

appeals noted that "a state could not draw a classification affecting speech protected to one group but not another to serve an interest unrelated to protecting the group for which the expression is unprotected." Yet, the result of the court of appeals' decision is to do just that. By limiting the definition of "harmful to minors" to material "harmful" only to older minors, and reading out of the statute material that while not "harmful" to older minors would be deemed "harmful" to other minors, the Eleventh Circuit has created a statute that does not serve its legislative intent. Whatever purpose the exemption might serve, the decision below renders the legislative intent behind the statutory scheme inoperative. All that is left is a statute that is unrelated to the protection of minors. Consequently, under the court of appeals' own analysis, the exemption is unconstitutional.

CONCLUSION

The Eleventh Circuit's decision to reinterpret the Georgia criminal statute after the Georgia Supreme Court refused to do so conflicts with this Court's precedents, violates principles of federalism and may materially affect other similar pending litigation. The court of appeals' decision upholding the library exemption causes a split in the circuits on the issues raised thereby. For all

of the above reasons, this Court should grant plaintiffs' petition.

Respectfully submitted,

March 26, 1991

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APPENDIX 1

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al., Plaintiffs,

v.

James WEBB, et al., Defendants.

Civ. A. No. C84-697A.

United States District Court,
N.D. Georgia,
Atlanta Division.

June 27, 1984.

ORDER

SHOOB, District Judge.

I. *Introduction*

This is an action for declaratory and injunctive relief challenging the constitutionality of recently enacted provisions of Georgia law governing the distribution and display of sexually explicit materials to minors. Plaintiffs are various associations of booksellers, publishers, periodical distributors, college stores, and retailers, as well as two bookstores and an author, all of whom contend they will be directly and adversely affected by the new law.[1]

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[1] Although some of the defendants contend in their answers that plaintiffs lack standing to maintain this action, both at trial and in their briefs defendants have not disputed plaintiffs' standing to challenge the new law's constitutionality except with respect to the claim that the law infringes parents' rights to rear their children free from state interference. This relatively restricted challenge to plaintiffs' standing is addressed *infra* at 689-690. Otherwise, for the same reasons stated by this Court with respect to a similar challenge to an earlier Georgia statute on the same subject, the Court finds that

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Defendants are various local solicitors, sheriffs, and police officials who have authority to enforce the law.[2]

The provisions challenged by plaintiffs appear in Section 3 of Act No. 1319 (the "Act"), 1984 Ga.Laws 1495, 1496-1501, *approved* April 5, 1984, *to take effect* July 1, 1984. *See* O.C.G.A. § 1-3-4(a)(1) (Michie 1982) (governing effective date of legislative Acts). Section 3 of the Act amends Part 3 of Article 3 of Chapter 12 of Title 16 of the Official Code of Georgia Annotated, relating to the sale and distribution of harmful materials to minors, by repealing the current O.C.G.A. §§ 16-12-102 through 16-12-104 (Michie Supp.1983) and inserting in lieu thereof new Code sections 16-12-102 through 16-12-104. (The new Code sections being challenged here are set out in full in the Appendix to this order. Amendments to the current law are indicated by striking through words deleted by the new Act and underlining words added by the new Act. Insignificant variations in punctuation and capitalization are not indicated.)

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plaintiffs have standing to maintain this action, and also that they have demonstrated the existence of the requisite "case or controversy" within the meaning of Article III of the U.S. Constitution. *See American Booksellers Ass'n v. McAuliffe*, 533 F.Supp. 50, 54-55 (N.D.Ga.1981).

[2] The Attorney General of Georgia is not named as a defendant, but he has been served with a copy of the proceeding pursuant to O.C.G.A. § 9-4-7(c), and he has retained a special assistant attorney general, Mr. George Weaver, who acted as lead counsel at trial on behalf of most of the defendants.

Plaintiffs filed their complaint on April 6, 1984, together with a motion for preliminary injunction or, in the alternative, for temporary restraining order. Since the challenged statute does not become effective until July 1, 1984, it was unnecessary to set the matter down for an immediate hearing, and the Court determined that the most expedient approach would be to consolidate trial on the merits with the hearing on the motion for preliminary injunction. Fed.R.Civ.P. 65(a)(2). Accordingly, following a short discovery period, this action came on for trial before the Court on May 31-June 1, 1984.

II. *Plaintiffs' Claims*

Plaintiffs bring this action pursuant to the first, fifth, and fourteenth amendments to the United States Constitution, 42 U.S.C. § 1983, and Article III, Section V, Paragraph III of the Georgia Constitution. Their complaint includes seven counts.

Count I of the complaint alleges that Section 3 of the Act is unconstitutionally overbroad in that it prohibits the furnishing or display of materials to minors that is not obscene as to minors. Count II alleges that Section 3, by virtue of its display provisions, violates adults' first amendment right of access to materials that are not obscene as to them. Count III alleges that Section 3 effects an unconstitutional prior restraint on free speech insofar as it restricts both the display and distribution of materials that are constitutionally protected both as to minors and adults. Count IV alleges that Section 3 is unconstitutionally vague in that it fails to provide fair notice as to what constitutes a criminal offense under the Act. Count

V alleges that Section 3's exemption of some libraries from its scope has no rational basis and therefore unconstitutionally denied plaintiffs the equal protection of the law. Count VI alleges that Section 3's blanket prohibition of *any* person's furnishing covered materials to minors violates a parent's fundamental right to rear his child free from interference by the state. Finally, Count VII alleges that Section 3 violates the Georgia Constitution's prohibition of the passage of any bill that refers to more than one subject matter.

III. *Abstention*

Before reaching the merits of plaintiffs' claims, the Court must address the threshold issue raised by defendants' motion to abstain, in which defendants contend that, under the standards announced in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), this Court should abstain from deciding the claims asserted by plaintiffs in favor of a prior state court resolution of certain unsettled questions of state law.

In *Pullman Co. v. Railroad Commission of Texas*, 33 F.Supp. 675 (W.D.Tex. 1940), the company asked a federal district court to enjoin enforcement of an order of the Texas Railroad Commission, claiming both that the order denied its rights under the fourteenth amendment to the United States Constitution and that it was invalid under Texas law. Without reaching the federal constitutional issues, the district court held that the challenged order was unauthorized under Texas law and enjoined its enforcement. 33 F.Supp. at 677-78. On direct review the Supreme Court held that the district court should have

abstained from deciding the case. Since "the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas," only abstention in favor of a state court adjudication of the state law issue would "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Pullman, supra*, 312 U.S. at 500, 61 S.Ct. at 645.

As subsequently formulated by the Supreme Court, *Pullman*-type abstention may be proper "[w]here resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law. . . . " *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965); *see also Duke v. James*, 713 F.2d 1506, 1510 (11th Cir.1983). Defendants argue that two claims raised by plaintiffs independently warrant the application of *Pullman* abstention here: first, plaintiffs' contention in Count VII of their complaint that the Act is invalid under the Georgia Constitution; and second, plaintiffs' claims in Counts II and III of the complaint that the Act's display provisions violate adults' first amendment rights. The Court will address the abstention question with respect to each of these claims in turn.

A. *The State Constitutional Issue*

Sections 1 and 2 of Act No. 1319, 1984 Ga.Laws 1495, 1495-96, amend O.C.G.A. §§ 16-6-4(b) and 16-6-5, relating to the punishment for child molestation and enticing a child for indecent purposes, respectively; whereas Section 3, which plaintiffs challenge here, relates solely to the

sale and display of materials deemed harmful to minors. Plaintiffs contend that the Georgia General Assembly's combination of these three sections into a single legislative Act violates the prohibition contained in Ga. Const. art. III, § V, ¶IH that "[n]o bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof."

Defendants respond that this is obviously a pure question of state law, the resolution of which might make it unnecessary to reach the federal constitutional issues. Hence, defendants conclude, this Court should abstain and give the state courts an opportunity to render an authoritative decision on the state constitutional issue.

Opposing abstention on this ground, plaintiffs cite language from the Eleventh Circuit's recent decision in *Duke v. James*, 713 F.2d 1506, 1510 (11th Cir. 1983), indicating that abstention should not be viewed "as a tool merely to abstract from the state courts an alternative state law ground for the judgment." The *Duke* court, however, went on to state that such a use of abstention is inappropriate only "when state law is clear." *Id.* In the instant case, it is by no means clear that the challenged Act comports with the state constitutional provision regarding bills that refer to more than one subject matter.[3]

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[3] Apparently, Section 3 of the Act was added as a floor amendment late in the legislative process, *see* Plaintiffs' Trial Brief at 85, and plaintiffs contend that many legislators who questioned the constitutionality of the amendment were nevertheless reluctant to vote against the bill because of the presence of the other two sections dealing with child molestation. If established, these facts clearly would support an argument

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Such a situation, where an unsettled question of state constitutional law may entirely moot plaintiffs' federal constitutional claims, presents a classic case for abstention.

Plaintiffs also cite the Supreme Court's recent decision in *Hawaii Housing Authority v. Midkiff*, ___ U.S. ___, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), for the proposition that abstention is not required simply because interpretation of the state constitution may obviate resolution of the federal constitutional questions. *Midkiff*, however, involved a state constitutional provision that merely paralleled the federal constitutional provision at issue, and, as the Court there noted, "abstention is not required for interpretation of parallel state constitutional provisions." 104 S.Ct. at 2327 n. 4 (citations omitted).

Where, on the other hand, the case may turn on the interpretation of some specialized state constitutional provision, abstention is appropriate. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84-85, 95 S.Ct. 870, 874-875, 43 L.Ed.2d 32 (1975); *Reetz v. Bozanich*, 397 U.S. 82, 87, 90 S.Ct. 788, 790, 25 L.Ed.2d 68 (1970). The state constitutional provision at issue in the instant case is

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that the Act runs afoul of one of the two primary purposes of the constitutional proscription, *viz.*, "the prevention of 'omnibus' bills combining many matters, adverse in their nature, with the view of combining in their favor the advocates of all and thus securing the passage of several measures no one of which could succeed upon its own merits." *Camp v. Metropolitan Atlanta Rapid Transit Authority*, 229 Ga. 35, 38, 189 S.E.2d 56 (1972); *see also Wall v. Board of Elections*, 242 Ga. 566, 569, 250 S.E.2d 408 (1978).

obviously a specialized provision that has no parallel in the federal Constitution. It appears to the Court, therefore, that this is an appropriate situation for *Pullman*-type abstention.

In a final effort to avoid abstention on the basis of the state constitutional issue, plaintiffs have purported to "withdraw" Count VII of their complaint. Plaintiffs' Post-Trial Brief at 5 n. 1. At this stage of the proceedings, however, such an alteration of plaintiffs' claims can be accomplished only by order of the Court in response to an appropriate motion filed pursuant to either Rule 15(a) or Rule 41(a)(2), Fed.R.Civ.P. In any event, even if the Court permitted withdrawal of Count VII, that would not significantly alter the abstention question. It is true that withdrawal of Count VII would eliminate the need for this Court to rule on the state constitutional issue. Nevertheless, should plaintiffs not prevail on their federal claims in this Court, they would remain free to reassert the state constitutional claim in state court and, if successful, to render nugatory this Court's determination of the federal constitutional issues. It is precisely the possibility of such "premature constitutional adjudication[s]" that the abstention doctrine is designed to avoid. *Pullman, supra*, 312 U.S. at 500, 61 S.Ct. at 645.

Accordingly, the Court concludes that it should abstain from deciding the merits of plaintiffs' federal claims, while plaintiffs seek an authoritative ruling from the state courts on the challenged Act's constitutionality under Article III, Section V, Paragraph III of the Georgia Constitution.

B. *Possibility of a Constitutional Construction of the Act*

Since the Court has already determined that abstention is appropriate on the basis of the state constitutional issue alone, it need not also decide whether the provisions of the Act that plaintiffs contend are violative of the federal Constitution are sufficiently susceptible of a constitutional construction by the state courts to provide an independent basis for abstention. However, since the Court has decided to remit plaintiffs to the state courts for a determination of the state constitutional issue, the interests of judicial economy dictate that plaintiffs at the same time seek a construction of the challenged portions of the Act in the light of their federal constitutional claims.

Although plaintiffs vigorously argue that no constitutional construction of Section 3 of the Act is possible, in this Court's view the Georgia courts might construe some or all of the challenged portions of the Act in such a way as to eliminate or substantially modify the federal constitutional claims raised by plaintiffs. Even if the possibility of such a construction is only slight, since abstention is appropriate in any event on the basis of plaintiffs' state constitutional claim, the state courts should at least be given an opportunity to construe the statute in the light of the federal constitutional issues raised by plaintiffs. If the Georgia courts decline or fail to provide a constitutional construction of the Act, then plaintiffs will be in no worse position than if they had not sought such a construction.[4]

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[4] The Court is aware of the possible difficulties in obtaining a construction of the challenged Act in a declaratory

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IV. *Interim Relief*

Plaintiffs have argued vigorously in opposition to abstention on the grounds that the inevitable delay in obtaining a final resolution of their claims will result in irreparable harm to their first amendment interests. The Supreme Court has noted that the abstention doctrine should be cautiously applied in the first amendment context:

> These principles [limiting abstention] have particular significance when, as in this case, the

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judgment action. The Georgia courts may find that in the present circumstances there is no justiciable controversy calling for the invocation of a declaratory judgment action, *see, e.g., City of Nashville v. Snow*, 204 Ga. 371, 49 S.E.2d 808 (1948), or they may decline to entertain a declaratory judgment action seeking construction of the Act on the grounds that such a declaration would be in effect an advisory opinion to this Court. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Hillhouse*, 131 Ga.App. 524, 206 S.E.2d 627 (1974). In the absence of the state constitutional issue, which forms an independent basis for abstention, the possible inadequacy of state remedies would counsel against abstention in the instant case. However, the Court is convinced that a state declaratory judgment action does at least provide an adequate means for litigation of plaintiffs' state constitutional claim, since as to this claim it would appear that a justiciable controversy exists between the parties, and the state court's decision would not be merely advisory but could be dispositive of the entire case. Moreover, as to the availability of a state court construction or limiting interpretation of the challenged statute, this Court will not assume that the Georgia courts "will not do their full duty in judging [this] statute[ ] in light of state and federal constitutional requirements." *Harrison v. NAACP*, 360 U.S. 167, 178, 79 S.Ct. 1025, 1031, 3 L.Ed.2d 1152 (1959).

> attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.

Zwickler v. Koota, 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967); *see also Cate v. Oldham*, 707 F.2d 1176, 1184 (11th Cir.1983).

Nevertheless, abstention is not always inappropriate where first amendment issues are raised. In *Harrison v. NAACP*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959), the Supreme Court ordered abstention on the question of the constitutionality of several Virginia statutes that had been challenged, *inter alia*, on first amendment grounds, because the statutes had not yet been interpreted by the state courts and were, in the Court's view, fairly susceptible to a constitutional construction. At the same time, however, the Court, recognized that enforcement of the challenged statutes during the pendency of state court proceedings could jeopardize the NAACP's first amendment rights and cause "great and immediate irreparable injury." 360 U.S. at 178, 79 S.Ct. at 1031. This factor did not weigh in the abstention decision because the state had assured the Court that it would not prosecute under the statutes until a final decision was reached as to their constitutionality. Even absent such assurances, however, or in the event they were not honored by the state, the Court noted that "the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the [NAACP]

while this case goes forward." 360 U.S. at 179, 79 S.Ct. at 1031.

More recently, the Supreme Court again ordered a district court to abstain where certain provisions of a state statute challenged on first amendment grounds were found to be susceptible to constitutional construction. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 306-312, 99 S.Ct. 2301, 2312-2316, 60 L.Ed.2d 895 (1979). There also the Court recognized the possibility of granting plaintiffs interim relief against enforcement of the challenged statute in order to mitigate the impact of abstention on their pursuit of constitutionally protected activities. 442 U.S. at 312 n. 18, 99 S.Ct. at 2316 n. 18. It left the question of the propriety of such relief to the district court on remand. *Id.*

Hence, in cases where abstention is otherwise indicated under the *Pullman* doctrine, but where plaintiffs will suffer irreparable harm if the challenged law is enforced while state law questions are litigated in state court, the district court retains the power to grant whatever interim relief is necessary to protect plaintiffs during the period of abstention. In the instant case, the Court believes that plaintiffs' concerns that the delay entailed by abstention will result in a serious chilling effect on their exercise of first amendment rights can be adequately addressed by considering the propriety of such interim relief. In this way, the interests underlying the abstention doctrine will be protected, but at the same time the principle that federal courts bear primary responsibility for the protection of federal rights also will be upheld.

The decision whether interim relief is appropriate will turn on the traditional factors that are weighed in any case where a preliminary injunction is sought: (1) whether plaintiffs have a substantial likelihood of success on the merits, (2) whether plaintiffs will suffer irreparable injury unless the relief is granted, (3) whether the threatened injury to plaintiffs outweighs whatever damage the proposed injunction may cause defendants, and (4) whether the relief, if granted, would be in the public interest.[5] *See, e.g., Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1354-55 (11th Cir.1983).

In addition, another factor unique to abstention cases must be taken into account. As one commentator has noted, insofar as the decision to grant interim relief rests in part on a preliminary evaluation by the Court of the merits of plaintiffs' case, it may conflict to some extent with the abstention interests in avoiding unnecessary constitutional decisionmaking and having state courts decide issues of state law. *See* Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 Cornell L.Rev. 65, 88-89 (1977). Accordingly, a court considering interim relief in an abstention case should assiduously avoid any unnecessary comment on the

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[5] In the instant case, the public interest is represented in part by plaintiffs' concerns for the preservation of first amendment freedoms but also in part by defendants' efforts to uphold the state's legitimate interest in protecting minors from certain harmful materials. Accordingly, in balancing the respective injuries to plaintiffs and defendants, the Court also is weighing the effect of interim relief on the public interest, and the Court therefore will not address the public interest factor separately.

merits of plaintiffs' claims, since any preliminary ruling on the merits "might be perceived by the state court as an attempt to force it to decide state law questions in accordance with the federal court's intimations." *Id.* at 69.

The Court should look first to the comparative injuries of the parties. Where the balance of harms is tilted heavily in favor of plaintiffs, then the court may grant interim relief without determining the likelihood of plaintiffs' success on the merits, as long as plaintiffs have raised substantial questions presenting fair grounds for litigation. *See generally* 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2948 at 453-54 (1973 & Supp.1984) and cases cited therein. Where, on the other hand, the balance of harms tips decidedly toward defendants, interim relief will be justified only if the court can be practically certain that plaintiffs will prevail on the merits, and plaintiffs also will suffer at least some significant harm in the absence of such relief.

Furthermore, where more than one provision of state law is being challenged, the court should, so far as possible, consider the propriety of interim relief with respect to each provision separately. In this way, relief may be narrowly tailored to avoid unnecessary interference with the state program but at the same time adequately protect plaintiffs from enforcement of specific provisions of the law that will result in irreparable harm.

The question of which provisions of a challenged act may be treated separately for purposes of interim relief is similar, but not identical, to the issue of the ultimate severability of the statute's various provisions. Generally, "[t]he controlling inquiry in matters of severance is

whether the legislature intended the offensive statutory provision to be an integral part of the statutory enactment viewed in its entirety." *Scheinberg v. Smith*, 659 F.2d 476, 481 (5th Cir. Unit B 1981). Legislative intent, however, should be only a secondary consideration in the interim relief context, since the decision is only preliminary and the relief to be granted only temporary. Accordingly, so long as a discrete provision of a challenged act may be given legal effect standing alone, and it does not plainly appear that its separate enforcement would be wholly contrary to the intent of the state legislature, the provision should be viewed separately for purposes of determining the propriety of interim relief during the period of abstention.

In the instant case, the challenged statute may be analyzed into five components: (1) the *definition* component, § 16-12-102, which defines the kind of materials that are deemed "harmful to minors" and are subject to the proscriptions set forth in the following sections; (2) the *distribution* component, § 16-12-103(a), which prohibits any person from selling or otherwise furnishing to a minor any material that is harmful to minors; (3) the *exhibition* component, § 16-12-103(b), which prohibits any person from exhibiting to a minor any motion picture, show, or other presentation that is harmful to minors; (4) the *display* component, § 16-12-103(e), which prohibits the display in public places where minors may be present of material that is harmful to minors; and (5) the *exemption* component, § 16-12-104, which exempts certain libraries from coverage under the Act.[6]

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[6] The only other provisions of the challenged law are subsections (c) and (d) of § 16-12-103, *see* Appendix, which

(Continued on following page)

With respect to these five components, interim relief could not be afforded separately as to either the definition or the exemption provisions without enjoining enforcement of the entire statute. The substantive prohibitions of § 16-12-103 derive their meaning from the definitions supplied in § 16-12-102, and without recourse to these definitions the substantive provisions could not be given legal effect. Likewise, interim injunctive relief could not be granted separately as to the exemption provisions in § 16-12-104, because to do so would expose the exempted libraries to criminal liability under the statute, which would clearly be contrary to the express intent of the Georgia legislature.

As to the remaining components – the provisions regarding distribution, exhibition, and display of materials harmful to minors – the Court finds that each may be addressed separately on the issue of interim relief. Although the legislature obviously intended to prohibit *all* of these modes of dissemination of harmful materials, it would not be plainly contrary to that intent to treat each proscription separately for the purposes of interim relief. If the Court finds that enforcement of only one of the prohibitions is likely to cause plaintiffs irreparable

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prohibit, respectively, (1) any minor from falsely representing himself as an adult in order to obtain material that is harmful to minors, and (2) any adult from falsely representing that he is the parent or guardian of a minor, or that such minor is actually an adult, in order to obtain for the minor any material that is harmful to minors. Plaintiffs have not challenged the validity of either of these two subsections.

harm, it certainly would not appear contrary to the legislative intent to permit enforcement of the remaining provisions.

Accordingly, the Court first will examine plaintiffs' challenges to §§ 16-12-102 and 16-12-104 (the definition and exemption components, respectively) to determine whether plaintiffs' likelihood of success and the balance of harms as to these claims justifies interim injunctive relief against enforcement of the entire statute. If not, then the Court will consider whether interim relief is appropriate as to one or more of the substantive prohibitions contained in § 16-12-103(a), (b), and (e) (the distribution, exhibition, and display components, respectively).

A. *Definition* (§ 16-12-102)

Section 16-12-102 of the new law is the focus of attack on grounds of both overbreadth and vagueness.[7] Comparing the harm to plaintiffs if interim relief is denied on these claims with the harm to defendants if such relief is granted, the Court finds the balance of harms does not tip decidedly in favor of either side. If relief is denied, plaintiffs may suffer irreparable injury to first amendment

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[7] On the basis of the alleged overbreadth and vagueness of this and other sections of the Act, plaintiffs also contend that the Act creates an impermissible prior restraint on free speech. Since, however, the prior restraint issue ultimately turns on the questions of overbreadth and vagueness, *see, e.g., M.S. News Co. v. Casado*, 721 F.2d 1281, 1292-93 (10th Cir. 1983), the Court will focus on these questions and will not address separately the prior restraint argument.

freedoms. At the same time, if relief is granted, enforcement of the entire statute must be enjoined, and the state's legitimate interest in protecting minors from certain harmful material would be completely frustrated. Since the likely harm to the parties is thus fairly evenly balanced, the Court must consider plaintiffs' likelihood of success on the merits of their claims in order to determine the propriety of interim relief.

Plaintiffs contend that the Act's definition of proscribed material is unconstitutionally overbroad in that it includes within its scope materials that are not obscene as to at least some minors. The first ground of plaintiffs' overbreadth attack is that § 16-12-102(1) of the new law does not require materials to be "taken as a whole" when applying each of the three parts of the definition of "harmful to minors." The current law applies the "taken as a whole" standard to all three parts of the test, but the new law would incorporate the standard only into the first and third, but not the second, parts of the test. *See* Appendix § 16-12-102(1)(A), (B), and (C). The Court, however, cannot agree that plaintiffs are likely to succeed on their claim that this amendment to the current law unconstitutionally broadens its scope.

The definition of "harmful to minors" in the current Georgia law, as well as in the challenged Act, is based directly on the definition contained in the New York statute upheld by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), as modified in light of the new three-part test of obscenity announced by the Court in *Miller v. California*, 413 U.S. 15,

93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).[8] The *Miller* obscenity test itself does not incorporate the "taken as a whole" standard into the second part of the test.[9] The Court concludes that plaintiffs are not sufficiently likely to succeed on this aspect of their overbreadth argument to justify interim relief.

Plaintiffs next argue that the statute is overbroad because it applies a single standard to all persons less than 18 years of age and thus unconstitutionally infringes on the first amendment rights of older, more mature minors, who are "possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg, supra,* 390 U.S. at 649-50, 88 S.Ct. at 1286 (Stewart, J., concurring). First of all, the Court cannot accept plaintiffs' premise that a single standard for all minors necessarily results in a

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[8] The *Ginsberg* test for materials "harmful to minors" was based on the then prevailing test for adult obscenity derived from *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966) (plurality opinion). The Supreme Court has not resolved the question of the effect of *Miller* on the *Ginsberg* formulation, *see Erznoznik v. City of Jacksonville,* 422 U.S. 205, 213 n. 10, 95 S.Ct. 2268, 2275 n. 10, 45 L.Ed.2d 125 (1975); however, the Tenth Circuit has recently upheld a local ordinance containing a similar modification of the *Ginsberg* test in light of *Miller. M.S. News Co. v. Casado,* 721 F.2d 1281, 1286-87 (10th Cir.1983).

[9] *See Miller, supra,* 413 U.S. at 24, 93 S.Ct. at 2615: "A state offense must . . . be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

standard "restricting the older adolescent to reading or viewing only that which is appropriate for the very young or immature child."[10] Plaintiffs' Trial Brief at 41. In any event, notwithstanding such a unitary standard of "harmfulness," the Supreme Court in *Ginsberg, supra,* inquiring "whether it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see," concluded that "we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors." 390 U.S. at 636-37, 88 S.Ct. at 1279 (footnote omitted). In light of *Ginsberg,* and in the absence of any case cited by plaintiffs holding that a unitary standard of obscenity for minors is unconstitutionally overbroad, the Court concludes that plaintiffs have not demonstrated a sufficient likelihood of success on the merits of this aspect of their overbreadth claim to justify interim relief.

Finally, plaintiffs attack § 16-12-102 on vagueness grounds, contending that "[t]he Act lacks a constitutional standard by which the proscribed material can be determined." Complaint ¶16. However, in *Ginsberg, supra,* the

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[10] The Court notes that a single standard of obscenity also is applicable to all adults, but the Court is not aware of any serious argument that such a standard is overbroad because it relegates more mature adults to reading or viewing only those materials that are appropriate for immature nineteen-year-olds. *Cf. Roth v. United States,* 354 U.S. 476, 489, 77 S.Ct. 1304, 1311, 1 L.Ed.2d 1498 (1957) (adult obscenity gauged by reaction of "the average person"); *see also Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973).

Supreme Court upheld an almost identical definition of "harmful to minors" against such a vagueness challenge. 390 U.S. at 643. Plaintiffs have not cited any material respect in which the definition of proscribed materials contained in § 16-12-102 differs from that upheld in *Ginsberg*. Accordingly, the Court finds that plaintiffs have failed to show a sufficient likelihood of success on the merits of this claim to justify interim relief.

B. *Exemption* (§ 16-12-104)

Plaintiffs challenge the exemption provisions of § 16-12-104 on both equal protection and vagueness grounds. The Court, however, finds that it need not consider the merits of these claims at this time, because there is no showing that plaintiffs will suffer any irreparable harm as a result of the exemption of certain libraries from coverage under the statute. There is therefore no need for interim relief as to these claims.

C. *Distribution* (§ 16-12-103(a))

Plaintiffs challenge § 16-12-103(a) on the grounds that it is unconstitutionally overbroad and that it unconstitutionally infringes on parents' rights to rear their children free from state interference. The overbreadth claim is based on the elimination of "taken as a whole" from the language of § 16-12-103(a)(1), which plaintiffs contend results in the proscription of material that is constitutionally protected even as to minors. The second claim is based on the addition of the phrase "or otherwise furnish or disseminate" to the general prohibitory language of the section, which plaintiffs contend would

prevent even parents from providing proscribed materials to their minor children, in violation of the parents' rights under the fourteenth amendment to direct their children's upbringing and education.

As to the alleged infringement of parents' rights, the Court must first consider whether plaintiffs have standing to assert this claim. Only one of the plaintiffs in this action is an individual, and he has not alleged that he is the parent of any minor children. Plaintiffs, however, rely on *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to support their standing on this issue.

In *Pierce* two private educational institutions, a Catholic parochial school and a military academy, successfully challenged the constitutionality of an Oregon statute requiring parents to send their minor children to public schools. Although the Court based its holding on the rights of parents, who were not parties to the action, to control their children's education, 268 U.S. at 534-35, 45 S.Ct. at 473-74, it recognized the private institutions' right to challenge the law because of the irreparable economic injury that its enforcement would cause them:

> Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. [Citations omitted.] But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very

> far to protect against loss threatened by such action. [Citations omitted.]
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> . . . .
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> Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate. . . .

268 U.S. at 535-36, 45 S.Ct. at 573-74.

Relying on *Pierce*, plaintiffs in the instant case apparently argue that if the challenged Act is enforced against parents, they will suffer irreparable economic injury from the loss of such parents' patronage. However, assuming without deciding that the economic injury suffered by plaintiffs would be sufficient to meet standing requirements, the Court finds no showing by plaintiffs that such injury would be sufficiently great to justify the issuance of interim injunctive relief at this stage of these proceedings. While potential economic loss that threatens a plaintiff's entire business may constitute irreparable injury for purposes of injunctive relief, *see Rhodes v. Gwinnett County, Georgia*, 557 F.Supp. 30, 33 n. 9 (N.D.Ga.1982), plaintiffs here have not established that any significant portion of their business would consist in selling parents materials covered by the challenged law for use by their minor children. Since plaintiffs have failed to demonstrate the requisite irreparable harm with respect to this

claim, the Court concludes that interim injunctive relief would be inappropriate.[11]

Turning to plaintiffs' overbreadth challenge to § 16-12-103(a), the Court reaches the merits of this claim because once again the potential harm to plaintiffs' first amendment rights and to the state's legitimate enforcement interests appear relatively evenly balanced. Plaintiffs argue that striking the phrase "taken as a whole" from § 16-12-103(a)(1) renders the scope of that subsection unconstitutionally overbroad. However, contrary to plaintiffs' arguments, the requisite "taken as a whole" standard is retained in subsection (1) by virtue of the requirement that the covered materials be "harmful to minors." As has already been noted, *supra* at 687-688, the Act's definition of "harmful to minors" incorporates the "taken as a whole" standard in conformity with the *Miller* test of obscenity. It would not appear necessary, therefore, that the specification of proscribed materials include both the words "taken as a whole" and "harmful to minors." Accordingly, the Court concludes that plaintiffs are not sufficiently likely to prevail on the merits of this claim to justify interim relief.

D. *Exhibition* (§ 16-12-103(b))

Plaintiffs challenge § 16-12-103(b) on grounds of overbreadth, vagueness, and infringement of parents'

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[11] The Court's conclusion is buttressed by defendants' express disavowal of any interpretation of the challenged law as applicable to parents or guardians. Defendants' Trial Brief at 30-31. Given their interpretation, defendants presumably will not seek to enforce the law against a parent or guardian who provides proscribed materials to his minor children.

rights to rear their children free from state interference. The claim based on parents' rights is identical to that raised against § 16-12-103(a), discussed *supra* at 689-690, and for the same reasons stated there the Court concludes that interim relief is not appropriate on the basis of this claim. As with plaintiffs' other vagueness and overbreadth claims, the threatened harm to plaintiffs' first amendment rights and to the state's legitimate enforcement interests are fairly evenly balanced; therefore, the Court must consider the merits of these claims to determine the need for interim relief.

Plaintiffs' overbreadth claim as to this subsection once again rests on the contention that the "taken as a whole" standard for judging materials has been removed, resulting in the prohibition of materials that are constitutionally protected even as to minors. Plaintiffs focus on the legislature's removal of the "taken as a whole" language from the current law and insertion of the phrase "in whole or in part," so that the new law would proscribe exhibition to a minor of "a motion picture, show, or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors." *See* Appendix § 16-12-103(b). The Court, however, cannot agree that this new language must be construed as rejecting the "taken as a whole" standard. First of all, the added phrase "in whole or in part" is not inconsistent with the "taken as a whole" standard. The fact that works may be proscribed which only partly contain "sexually explicit nudity, sexual conduct, or sadomasochistic abuse" does not imply that the works are not still to be judged "as a whole."

Second, the "taken as a whole" standard is in fact incorporated into this subsection by the requirement that proscribed materials meet the definition of "harmful to minors." *See* discussion *supra* at 687-688, 690-691. Accordingly, the Court concludes that plaintiffs have not demonstrated a sufficient likelihood of success on this claim to justify interim relief.

Plaintiffs also challenge on overbreadth grounds the language in the new law that prohibits the exhibition of covered films "at any such premises which are not designed to prevent viewing from any public way of such motion picture by minors not admitted to any such premises." *See* Appendix § 16-12-103(b). Plaintiffs analogize this provision to the municipal ordinance struck down by the Supreme Court on overbreadth grounds in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). The Jacksonville ordinance, however, "sweepingly for[bade] display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness," 422 U.S. at 213, 95 S.Ct. at 2274 (emphasis in original), and thus prohibited exhibition of films that could not be deemed obscene even as to minors under the *Ginsberg* formulation. *Id.* The Court suggested that if a narrowing-construction limiting the ordinance to films that were obscene as to minors were possible, then its facial validity would be upheld. 422 U.S. at 216 & n. 15, 95 S.Ct. at 2276 & n. 15. Since the statute challenged by plaintiffs here, unlike the Jacksonville ordinance in *Erznoznik*, may be construed as limited to materials that are obscene as to minors, the Court concludes that plaintiffs have not demonstrated a sufficient likelihood of success on the merits of this claim to justify interim relief.

Finally, plaintiffs' vagueness argument focuses on the ambiguity of the word "premises". Subsection 16-12-103(b) makes it unlawful "for any person knowingly to sell or furnish to a minor an admission ticket or pass or knowingly to admit a minor to premises whereon there is exhibited a motion picture, show, or other presentation" that is proscribed under the Act. Plaintiffs raise the following question: "Would the owner of a multi-screen theatre be in violation of the Act if he sold a ticket to a minor to see a movie which is not in violation of the Act, knowing that there also is being exhibited on his premises a movie which is in violation of the Act?" Plaintiffs' Trial Brief at 51. Although there may be some uncertainty here, it is within such a narrow range that it is doubtful whether the vagueness rises to the level of a due process violation. *See Roth v. United States*, 354 U.S. 476, 491-92, 77 S.Ct. 1304, 1312-13, 1 L.Ed.2d 1498 (1957). Accordingly, the Court concludes that plaintiffs have failed to demonstrate a sufficient likelihood of success on the merits of their vagueness challenge to this subsection to justify interim relief.

E. *Display* (§ 16-12-103(e))

Plaintiffs attack the display provision of the new law on grounds of overbreadth and vagueness. As to these claims, the Court finds that the likely harm to plaintiffs if interim relief is denied substantially outweighs the harm to defendants if enforcement of these provisions is temporarily enjoined during the period of abstention.

The testimony at trial showed that some retailers interpreted the display provisions of the Act as providing

them with only two possible avenues of compliance. First, the retailer who wished to maintain on his shelves materials that might be covered by the Act could simply exclude all minors from the premises. Alternatively, the retailer could remove from his shelves all materials he believed might run afoul of the law. Given the wide range of materials that some retailers would judge to fall within the scope of the Act,[12] it is clear that either alternative would result in significant economic loss to retailers, as

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[12] The evidence at trial established that, for all practical purposes, it would be impossible for retailers to review the contents of books, periodicals, and other materials, either before or after purchasing them, in order to determine which materials might be harmful to minors within the meaning of the statute. Because of the large number of items ordered and on hand in bookstores, it is not possible for the retailer to read or even to review the contents of each particular item before placing it on display and offering it for sale. Accordingly, a retailer's judgment regarding what might be harmful to minors must be categorical in nature, *i.e*, based upon the general subject matter of the material or the reputation of the author. Testimony showed that, in exercising such judgment, retailers would conclude that a very wide range of materials is covered by the new law, including many new works of fiction appearing on both local and national best-seller lists, as well as recognized literary classics, photography and art books, and books on sex education. *See generally* Plaintiffs' Trial Exhibits 2-16. Although defendants disavow any intention to enforce the new law with respect to materials of the type cited by plaintiffs, *cf.* Defendants' Trial Exhibits 1-20 (relatively narrow range of sexually explicit magazines and books which defendants contend are encompassed by the Act's definition of "harmful to minors"), the Court finds that retailers, in an effort to minimize the possibility of arrest and prosecution, would err on the side of caution and treat all materials that are even arguably within the scope of the Act as being covered.

well as to publishers and authors, and would significantly restrict the access of both minors and adults to communicative materials of all kinds. The Court concludes that enforcement of the display provisions prior to a possible narrowing interpretation of the Act by the Georgia courts would result in immediate, irreparable injury to the first amendment rights of both plaintiffs and others.

The harm to the state, on the other hand, should enforcement of these provisions be temporarily enjoined, while not insignificant, would be substantially less serious. It is true that the state's legitimate interest in protecting minors from harmful materials would be temporarily frustrated in part. However, the state's effort to regulate such materials would remain unimpaired with regard to the prohibition of distribution and exhibition of such materials pursuant to § 16-12-103(a) and (b).[13] Given that a substantial portion of the state regulatory program would remain in effect, and that plaintiffs are threatened with irreparable injury absent some interim relief from enforcement of the Act's display provisions, the Court concludes that the balance of harms is tilted decidedly in favor of plaintiffs as to these claims. Accordingly, so long as plaintiffs have raised substantial questions presenting fair grounds for litigation, interim relief as to the Act's display provisions will be appropriate.

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[13] The Court's entry of an order temporarily enjoining enforcement of certain provisions of the Act would not, of course, otherwise prevent the Act's becoming fully effective and enforceable on July 1, 1984, as provided under state law. Only enforcement of the specific provisions covered by the Court's injunction would be prohibited.

Turning to the merits of plaintiffs' claims, the Court finds that plaintiffs have raised substantial constitutional questions as to both overbreadth and vagueness of the Act's display provisions. First, as to overbreadth, it is well settled that legislation whose purpose is to protect minors from exposure to sexually oriented material will be stricken as overbroad when it unnecessarily restricts adults' access to the material. *Butler v. Michigan*, 352 U.S. 380, 383-84, 77 S.Ct. 524, 525-26, 1 L.Ed.2d 412 (1957). It is undisputed that some of the materials deemed harmful to minors under the new Georgia law are constitutionally protected as to adults, and plaintiffs clearly have raised substantial questions as to whether the display provisions of the Act unnecessarily restrict adults' access to these protected materials. *See* note 12 *supra* and accompanying text.

Plaintiffs have also raised substantial questions as to the vagueness of the Act's display provisions. It is unclear, for example, what may constitute a "display" of materials under the Act, or what might qualify as a "public place frequented by minors." Although the Georgia courts may eliminate any vagueness by means of a definitive, narrowing interpretation, prior to any such interpretation, the Court must find that plaintiffs have raised sufficient vagueness concerns to justify temporary interim relief.

Accordingly, having found that plaintiffs have raised substantial questions presenting fair grounds for litigation as to the constitutionality of the Act's display provisions, the Court concludes that interim injunctive relief preventing the enforcement of these provisions is appropriate. The Court, however, must still address plaintiffs'

concerns that the scope of such an injunction will be inadequate to provide the necessary relief.

F. *Scope of Relief*

Plaintiffs have argued that interim injunctive relief will be inadequate to protect the first amendment interests at stake, because the injunction will not have statewide effect but will operate only against the defendants currently before the Court. Plaintiffs' Post-Trial Brief at 9. However, pursuant to Fed.R.Civ.P. 65(d), this Court's injunction will be binding upon defendants, "their officers, agents, servants, employees, and attorneys, *and upon those persons in active concert or participation with them* who receive actual notice of the order by personal service or otherwise." (Emphasis added.) The persons encompassed within the emphasized language include those "so identified in interest with those named in the decree that it would be reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding." 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2956 at 560 (1973).

In the instant case, the Attorney General of Georgia, although not named as a party, was served with a copy of the proceeding and entered an appearance through counsel to argue in support of the challenged Act's constitutionality. *See* note 2 *supra*. Under these circumstances, the Court concludes that the Attorney General is "so identified in interest" with the named defendants that he will be bound by the Court's injunction as a "person[] in active concert or participation with" defendants.

Likewise, the Attorney General's appearance in this case clearly served to represent the rights and interests of other subordinate state law enforcement officials, not named as parties to this action, who might seek to enforce the challenged Act. Accordingly, these state law enforcement officials also will be bound by the Court's injunction, and plaintiffs will thus enjoy state-wide interim relief from enforcement of the Act's display provisions.

V. *Conclusion*

For the foregoing reasons, defendants' motion to abstain is GRANTED. Pursuant to the procedures set out in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), and *Government and Civic Employees Organizing Committee, CIO v. Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed.2d 894 (1957), plaintiffs should proceed to the Georgia courts for a determination of their state constitutional claim, as well as construction of the challenged portions of the Act in the light of their federal constitutional claims.

Although plaintiffs, of course, are free to litigate both state and federal issues in the state courts, they may preserve their right to return to this Court by making on the state record a reservation to the disposition of the entire case by the state courts. *England, supra*, 375 U.S. at 421, 84 S.Ct. at 467. Then, should the state courts hold against plaintiffs on the state law questions, they may return to this Court for disposition of their federal claims.

Until the Georgia courts have been afforded an opportunity to determine the state law issues as set out above, all further proceedings in this action are STAYED.

This Court will retain jurisdiction pending determination of the issues of state law in the Georgia courts, or until efforts to obtain such a determination have been exhausted. *See American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 409 U.S. 467, 93 S.Ct. 627, 34 L.Ed.2d 651 (1973).

In the interim, defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert and participation with them, including the Attorney General of Georgia and all other subordinate state law enforcement officials, who receive actual notice of this order by personal service or otherwise, are hereby ENJOINED until further order of this Court, from enforcing or attempting to enforce O.C.G.A. § 16-12-103(e), which appears in Section 3 of Act No. 1319, 1984 Ga.Laws 1495, 1496-1501, *approved* April 5, 1984, *to take effect* July 1, 1984.

In sum, the Court (1) ABSTAINS from deciding the claims asserted by plaintiffs, (2) STAYS all further proceedings in this action pending determination of state law issues in the Georgia courts or exhaustion of efforts to obtain such a determination, and (3) in the interim, ENJOINS enforcement of the display provisions of the challenged Act as more specifically set out herein.

APPENDIX

New Code sections 16-12-102 through 16-12-104 amend the current Georgia law as follows:

16-12-102. As used in this part, the term:

(1) 'Harmful to minors' means that quality of ~~any~~ description or representation, in whatever form, of ~~sexually explicit~~ nudity, sexual conduct, sexual excitement, ~~bestiality,~~ or sadomasochistic abuse, when ~~taken as a whole~~ it:

(A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(C) ~~Lacks~~ Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

(2) 'Knowingly' means having *a* general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(A) The character and content of any material described in this part which is reasonably susceptible ~~of~~ to examination by the defendant; and

(B) The age of the minor; provided, however, that an honest mistake shall constitute an excuse from liability ~~under~~ in this part if the defendant made a reasonable, bona fide attempt to ascertain the true age of such minor.

(3) 'Minor' means a person ~~under the age of 16~~ less than 18 years of age.

(4) 'Sadomasochistic abuse' means actual or simulated flagellation or torture by or upon a person who is

nude, ~~or~~ clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained ~~on the part of~~ by one so clothed or nude.

(5) 'Sexual conduct' means actual or simulated acts of masturbation, homosexuality, ~~bestiality~~, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such ~~person~~ be ~~a~~ female, breasts.

(6) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(7) 'Sexually explicit nudity' means ~~the showing of~~ a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

16-12-103. (a) It shall be unlawful for any person knowingly to sell or loan for monetary consideration or otherwise furnish or disseminate to a minor:

(1) ~~A~~ Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or ~~portion~~ of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which~~, taken as a whole,~~ is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of the ~~Code~~ subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

~~16-12-104.~~ (b) It shall be unlawful for any person knowingly ~~to exhibit for a monetary consideration to a person under the age of 18 or knowingly~~ to sell or furnish to ~~a person under the age of 18~~ a minor an admission ticket or pass or knowingly to admit a ~~person under the age of 18~~ minor ~~for a monetary consideration~~ to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which, ~~taken as a whole,~~ is harmful to minors or exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by minors not admitted to any such premises.

(c) It shall be unlawful for any minor falsely to represent to any person mentioned in subsection (a) or subsection (b) of this Code section or to his agent that such minor is 18 years of age or older with the intent to procure any material set forth in subsection (a) of this Code section or with the intent to procure such minor's admission to any motion picture, show, or other presentation, as set forth in subsection (b) of this Code section.

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) of this Code section or to

his agent that he is the parent or guardian of any minor or that any minor is 18 years of age or older with the intent to procure any material set forth in subsection (a) of this Code section or with the intent to procure such minor's admission to any motion picture, show, or other presentation, as set forth in subsection (b) of this Code section.

(e) It shall be unlawful for any person knowingly to exhibit, expose, or display in public at newsstands or any other business or commercial establishment or at any other public place frequented by minors or where minors are or may be invited as part of the general public:

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in para-1(1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

16-12-104. The provisions of Code Section 16-12-103 shall not apply to any public library operated by the state or any of its political subdivisions nor to any library operated as a part of any school, college, or university.

APPENDIX 2

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al., Plaintiffs-Appellants,

v.

James WEBB, et al., Defendants-Appellees.

No. 84-8625.

United States Court of Appeals, Eleventh Circuit.

Oct. 22, 1984.

Before HILL, FAY and HATCHETT, Circuit Judges.

PER CURIAM:

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF GEORGIA PURSUANT TO ARTICLE VI, SECTION VI, PARAGRAPH IV OF THE GEORGIA CONSTITUTION

TO THE SUPREME COURT OF GEORGIA AND THE HONORABLE JUSTICES THEREOF:

It appears to the United States Court of Appeals for the Eleventh Circuit that the above matter involves questions or propositions of the law of the State of Georgia which may be determinative of the case, and there are no clear controlling precedents in the decisions of the Supreme Court of Georgia. The United States Court of Appeals for the Eleventh Circuit therefore certifies the following questions of law of the State of Georgia to the Supreme Court of Georgia for instructions concerning

such questions of law, based upon the facts recited herein and in the record which accompanies this certification.

I. *Style of Case*

The style of the case in which this certificate is made is as follows: American Booksellers Association, Inc., et al., Plaintiffs-Appellants, versus James Webb, et al., Defendants-Appellees, Case No. 84-8625, filed in the United States Court of Appeals for the Eleventh Circuit, on appeal from the United States District Court for the Northern District of Georgia.

II. *Statement of Facts*

Appellants filed suit on April 6, 1984 against Appellees seeking declaratory and injunctive relief challenging the constitutionality of Act 1319 of the Georgia General Assembly, 1984 Ga.Laws 1495, which was to become effective as a statewide law on July 1, 1984.

Sections 1 and 2 of the Act effect changes in punishment for the offenses of child molestation and enticing a child for indecent purposes, respectively. Section 3 of the Act relates solely to the sale and display of materials deemed harmful to minors. Appellants challenge the law under the First, Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. Section 1983, and Article III, Section V, Paragraph III of the Georgia Constitution. Their complaint includes seven counts.

Count one of the complaint alleges that Section 3 of the Act is unconstitutionally overbroad in that it prohibits the furnishing or displaying of materials to minors that

are not obscene as to minors. Count two alleges that Section 3, by virtue of its display provisions, violates the First Amendment right of adults to have access to materials that are not obscene as to them. Count three alleges that Section 3 effects an unconstitutional prior restraint on free speech insofar as it restricts both the display and distribution of materials that are constitutionally protected both as to minors and adults. Count four alleges that Section 3 is unconstitutionally vague in that it fails to provide fair notice as to what constitutes a criminal offense under the Act. Count five alleges that Section 3's exemption of some libraries from its scope has no rational basis and therefore unconstitutionally denies Appellants the equal protection of the law. Count six alleges that Section 3's prohibition of the furnishing of covered materials to minors violates a parent's fundamental right to rear his child free from interference by the state. Finally, count seven alleges that Section 3 violates the Georgia Constitution's prohibition of the passage of any bill that refers to more than one subject matter.

A non-jury trial was held before the district court on May 31 and June 1, 1984. Plaintiffs and defendants called several witnesses who testified regarding their understanding of the Act, the effect it might have on various businesses, and the manner in which it might be enforced.

On May 31, Appellees filed a Motion to Abstain, contending that, under the standards announced in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the district court should abstain from deciding the claims asserted by Appellants

in favor of a prior state court resolution of certain unsettled questions of state law. On June 27, 1984, 590 F.Supp. 677, the trial court issued an Order abstaining from deciding the merits of Appellants' federal claims and directing Appellants to seek an authoritative ruling from the state courts regarding the Act's constitutionality under Article III, Section V, Paragraph III of the Georgia Constitution. The trial court also expressed the view that the Georgia courts might construe some or all of the challenged portions of the Act in such a way so as to eliminate or substantially modify the federal constitutional claims raised by plaintiffs. Therefore, the trial court directed Appellants, in the interest of judicial economy, to seek a construction of the challenged portions of the Act in light of their federal constitutional claims. In the interim, the trial court enjoined enforcement of the provisions of the Act prohibiting the display of materials in public places where minors may be present. This appeal followed.

III. *Questions to be Certified to the Georgia Supreme Court*

1.

Whether the combination of the three sections of Act 1319, 1984 Ga.Laws 1495, into a single legislative act violates the prohibition contained in Article III, Section V, Paragraph III, of the Georgia Constitution that "[n]o bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof"?

2.

How does the Georgia Supreme Court construe the provisions in Act 1319, 1984 Ga.Laws 1495, which have been challenged in this suit?

Our statement of these questions is not designed to limit the inquiry of the Supreme Court of Georgia.

> [T]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

Martinez v. Rodriguez, 394 F.2d 156, 159 n. 6 (5th Cir.1968).

The entire record in the case is transmitted herewith for any assistance it might provide to the Court in answering the certified questions. Pending the Georgia Supreme Court's answers to the foregoing certified questions, all further proceedings in this appeal are STAYED.

In accordance with the provisions of the district court's June 27, 1984 Order, as well as the procedures set out in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), and *Government and Civil Employees Organizing Committee, CIO v. Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed.2d 894 (1957), the right of Appellants to return to the district court, following the receipt of answers to the foregoing questions from the Georgia Supreme Court, is preserved.

Appellants have expressly reserved their federal constitutional claims for ultimate decision by the district court following the proceedings in the Supreme Court of Georgia.

CERTIFIED.

APPENDIX 3

AMERICAN BOOKSELLERS ASSOC., et al.

v.

WEBB, et al.

No. 41739.

Supreme Court of Georgia.

May 22, 1985.

Rehearing Denied June 10, 1985.

CLARKE, Justice.

This case is before our Court on certified questions from the United States Court of Appeals for the Eleventh Circuit, and arose as a suit filed in the District Court for the Northern District of Georgia for declaratory and injunctive relief challenging the validity of an act, 1984 Ga.Laws 1495 (hereinafter the Act), amending OCGA § 16-12-102, et seq., on state and federal constitutional grounds. *American Booksellers Association, Inc. v. Webb*, 744 F.2d 784 (11th Cir.1984); *American Booksellers Association, Inc. v. Webb*, 590 F.Supp. 677 (N.D. Ga.1984). The section of the Act under attack relates to the sale, distribution and furnishing of materials deemed harmful to minors. The questions posed to this Court are as follows:

(1) Whether the combination of the three sections of Act 1319, 1984 Ga.Laws 1495, into a single legislative act violates the prohibition contained in Article III, Section V, Paragraph III, of the Georgia Constitution that "[n]o bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof?"

(2) How does the Georgia Supreme Court construe the provisions in Act 1319, 1984 Ga.Laws 1495, which have been challenged in this suit?

The declaratory and injunctive relief is being sought by bookselling, publishing and distributing associations, along with two bookstores and one author; the defendants are various law enforcement officials. The constitutional complaints are for the most part based upon alleged violations of the United States Constitution. However, one state constitutional ground was raised, that is that the Act violates Art. III, Sec. V, Par. III of the Georgia Constitution, the applicable portion being set forth in question number one.

The defendants in the district court made a motion for the court to abstain from deciding the federal constitutional questions in order to seek a resolution of issues of state law from the state court under the authority of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The plaintiffs then moved to withdraw their state constitutional claim; the district court declined to allow withdrawal and ruled in favor of abstention because a resolution of the state law issue could render the federal claims moot. 590 F.Supp. 677, 682-684. The district court, having ruled that abstention was proper on the state constitutional ground, held that defendants could also ask this Court to construe the Act in a manner which might eliminate some of the federal constitutional problems saying, "[i]f the Georgia courts decline or fail to provide a constitutional construction of the Act, then plaintiffs will be in no worse position than if they had not sought such a construction." 590 F.Supp. 677, 684. Pending final resolution of all matters,

the district court granted partial interim relief by issuing a preliminary/interlocutory injunction against the enforcement of the display provisions set forth in OCGA § 16-12-103(e), 1984 Ga.L. 1495, 1501.

* * *

2. The second question posed invites this Court to construe that part of the Act codified in OCGA § 16-12-102, et seq. More specifically the parties are most concerned with OCGA § 16-12-103(e), prohibiting the display of materials which defendant-appellees have been enjoined from enforcing. The plaintiff-appellants argue that the words of the statute are so overbroad that a judicial narrowing of the terms would amount to judicially legislating. The appellees argue that this Court can give a narrowing construction to the statute restricting its application.

In viewing this question, we note that the challenge here is anticipatory. The appellees have advanced various factual situations and suggest ways the Act would or would not apply in order to protect constitutional rights of the plaintiffs and members of the public. However, because of the anticipatory nature of the suit there are no facts presenting a controversy to which this court can apply the provisions of the 1984 law. In the absence of a factual controversy we believe it to be inappropriate for this court to establish the parameters within which the Act may or may not be operative. There being no state claims, constitutional or otherwise, remaining, and the federal claims being specifically preserved, 744 F.2d 784, this court respectfully declines the invitation to answer the second submitted question.

The first question is answered in the negative. The second question is declined.

All the Justices concur.

APPENDIX 4

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al., Plaintiffs,

v.

James WEBB, et al., Defendants.

Civ. A. No. C84-697A.

United States District Court,
N.D. Georgia,
Atlanta Division.

Sept. 26, 1986.

ORDER

SHOOB, District Judge.

I. *Introduction*

This case presents a conflict between one of society's most cherished rights – freedom of expression – and one of government's most profound obligations – the protection of minors. Seeking declaratory and injunctive relief, plaintiffs[1] challenge a Georgia statute, O.C.G.A. §§ 16-12-102 – 16-12-104 (the "Act"),[2] that, *inter alia*,

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[1] Plaintiffs are various associations of booksellers, publishers, periodical distributors, college stores, retailers, two bookstores, and an author. Defendants are various local solicitors, sheriffs, and police officers who have authority to enforce the challenged statute. The Attorney General of Georgia is not a named defendant, but he was served under O.C.G.A. § 9-4-7(c), and he was represented by George Weaver, who was appointed as a special assistant attorney general for this case and who acted as lead counsel at trial.

[2] The relevant sections of the Act are set forth in the Appendix to this order. Amendments to the current law are

(Continued on following page)

makes it a criminal offense to sell to minors or to display in a place accessible to minors any material deemed "harmful to minors" under the Act. In contrast to Georgia's obscenity statute, O.C.G.A. § 16-12-80,[3] which

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indicated by striking through words deleted by the new Act and underlining words added by the new Act. Insignificant variations in punctuation and capitalization are not indicated.

[3] Under O.C.G.A. § 16-12-80, which in large part tracks the standard enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), material is obscene if

> (1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;
>
> (2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and
>
> (3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E) below:
>
> (A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
>
> (B) Acts of masturbation;
>
> (C) Acts involving excretory functions or lewd exhibition of the genitals;
>
> (D) Acts of bestiality or the fondling of sex organs of animals; or

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defines obscenity based on an adult's perception, the Act requires that material be assessed based on its appeal to minors; thus, it is clear that certain materials classified as harmful to minors would qualify as protected speech with respect to adults.

This variable standard of obscenity is not novel. Indeed, nearly twenty years ago, the United States Supreme Court held that a state may, without violating the First Amendment, employ a variable standard of obscenity to bar the sale of sexually explicit materials to minors.[4] Consequently, the Court finds no problem with the sale provision of the Act. Nevertheless, plaintiffs' attacks on the display provision and the statutory exception for libraries present vexing and unsettled questions.

The Supreme Court has yet to address directly the constitutionality of employing a variable obscenity standard to proscribe the display of otherwise protected

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(E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.

(d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

[4] *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

materials. Although this Court is not writing on a clean slate, courts facing the issue have reached divergent conclusions.[5] There appears to be general agreement, however, on at least one point: in ruling on a constitutional challenge to a law designed to protect minors from certain forms of expression, a court must balance the extent to which the law serves the state's interest in safeguarding minors against the extent to which it infringes on the First Amendment rights of adults.[6]

Applying this analysis to the instant case, the Court concludes that the Act strays too far into the realm of protected speech to pass constitutional muster. At trial, plaintiffs introduced detailed evidence concerning the publishing and bookselling business. Based on this evidence, the Court is convinced that the Act imposes an

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[5] Several courts have held that display provisions similar to the Act are overbroad because they infringe on the First Amendment rights of adults. *American Booksellers Association v. Virginia*, 792 F.2d 1261 (4th Cir.1986), *aff'g*, 617 F.Supp. 699 (E.D.Va.1985); *Rushia v. Town of Ashburnham*, 582 F.Supp. 900 (D.Mass.1983); *American Booksellers Association v. McAuliffe*, 533 F.Supp. 50 (N.D.Ga.1981); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Col.1985). Other courts have upheld such laws as valid time, place, and manner restrictions that impose only an incidental burden on protected speech. *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389 (8th Cir.1985), *aff'g*, 602 F.Supp. 1361 (D.Minn.1985); *M.S. News v. Casado*, 721 F.2d 1281 (10th Cir.1983); *American Booksellers Association v. Rendell*, 332 Pa.Super. 537, 481 A.2d 919 (1984). The United States Court of Appeals for the Eleventh Circuit has yet to consider the issue.

[6] *See, e.g., Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1394-95 (8th Cir.1985), *aff'g*, 602 F.Supp. 1361, 1373-74 (D.Minn.1985); *Cruz v. Ferre*, 755 F.2d 1415, 1421 (11th Cir.1985).

unreasonable burden on the First Amendment rights of authors, publishers, booksellers, and adult readers. This is not to suggest that the First Amendment stands as a barrier to a carefully drafted and narrow display statute. *See infra* at 1556. But when a legislature deals in the sensitive area of protected speech, it must draft legislation with reasonable precision. The display provision at issue here goes well beyond the permissible boundaries of regulation, prohibiting the display not only of sexually graphic magazines and novels, but also of classic works of literature and a significant percentage of popular fiction. Thus, the Act would, in effect, reduce an adult's selection of reading materials to a book list suitable for a fifth-grade class. In addition, the statutory exception for libraries violates the Equal Protection Clause of the Fourteenth Amendment.

II. *Background and Findings of Fact*

A. *Background*

Governor Joe Frank Harris signed the Act on April 5, 1984; it was scheduled to take effect July 1, 1984. *See* O.C.G.A. § 1-3-4(a)(1) (governing the effective date of legislative acts). Plaintiffs filed suit on April 6, 1984, and moved for a preliminary injunction. After a brief discovery period, the Court consolidated a trial on the merits with a hearing on the motion for a preliminary injunction. In addition to the First Amendment and Equal Protection grounds considered in this order, plaintiffs' complaint challenged the Act based on the following state constitutional provision: "[n]o bill shall pass which refers to more than one subject matter or contains matter different from

what is expressed in the title thereof." Ga. Const. Art. III, § V, ¶ III. Plaintiffs argued that the bill containing the Act, 1984 Ga.Laws 1495, violated this prohibition because it addressed both the prosecution of sexual offenses against children, O.C.G.A. §§ 16-6-4(b) and 16-6-5, and the sale and display of materials deemed harmful to minors. O.C.G.A. §§ 16-12-102 – 16-12-104.

At trial, defendants contended that, because the resolution of the state constitutional issue would render moot plaintiffs' federal constitutional claims, abstention was proper under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The Court agreed. By order dated June 27, 1984, the Court abstained from deciding the claims asserted by plaintiffs, stayed the case pending proceedings in the Georgia courts, and granted plaintiffs partial interim relief. 590 F.Supp. 677 (N.D.Ga.1984).

Plaintiffs appealed the June 27, 1984, order to the United States Court of Appeals for the Eleventh Circuit, which granted the parties' joint motion to present two certified questions to the Georgia Supreme Court. 744 F.2d 784 (11th Cir.1984). The first certified question inquired whether the Act violated the one subject matter provision of the Georgia constitution. The second requested a construction of the challenged portions of the Act. The Georgia Supreme Court answered the first question in the negative and declined to answer the second question. 254 Ga. 399, 329 S.E.2d 495 (1985). With this procedural background in place, the Court will turn to the relevant facts.

B. *Findings of Fact*

Plaintiffs' evidence at trial demonstrated that in-store display of books is the cornerstone of the industry's marketing practices. Relatively few books are advertised through the mass media, and, as a result, the vast majority of sales are impulsive selections prompted by a display. In the words of author Pat Conroy, "display unfortunately seems to be almost everything in modern day book publishing." Transcript of May 31, 1984, at 150. Similarly, bookstore owner Donald Arnold testified that a book is unlikely to sell many copies if it is not prominently displayed because

> [m]ost people are a little . . . shy about asking for something. If they don't see it on display, usually they won't ask for it.

Id. at 136.

Although it is difficult to determine with certainty how many books fall within the Act, the Court finds that a significant percentage of an average bookstore's inventory would be barred from display. Bookstore owner Frank McGuire ("McGuire") stated that approximately 50% of the books he carried would be classified as harmful to minors under the Act. The Court does not question McGuire's sincerity, but his and similar estimates are based on overly broad readings of the Act. McGuire expressed concern that an "exercise magazine" featuring women clad in revealing bathing suits could be deemed harmful to minors. *See* Plaintiffs' Exhibit # 6. Though the Act is quite broad, its terms are limited to

> description[s] or representation[s] . . . of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, [which]:

> (A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;
>
> (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

O.C.G.A. § 16-12-102(1). Plainly, the type of magazine to which McGuire referred would not be covered by this definition.

Nonetheless, the Court does accept the opinion offered by Heather Florence, Vice-President, Secretary, and General Counsel of Bantam Books, Inc., viz., "that the predominant amount of all of the adult reading material, fiction and nonfiction, could arguably be encompassed within the terms of [the Act]." *Id.* at 87. Plaintiffs submitted several exhibits to support this view. *The White Hotel* by D.M. Thomas enjoyed critical acclaim and commercial success and holds obvious literary value for adults. *See* Plaintiffs' Exhibit # 11. Yet, under the Act, it could not be displayed because it contains several passages that graphically depict sexual encounters and because its literary value is beyond the comprehension of most minors. Accordingly, although a seventeen-year-old might appreciate the book's literary value, to the extent a ten-year-old could read and understand the book, it would appeal to his prurient interest.[7] Furthermore, the

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[7] Bobbie Alford, a trained educator, offered a similar observation with regard to the play *Cat on a Hot Tin Roof* by Tennessee Williams.

book does not meet the prevailing community standard with respect to what is suitable reading for most minors. For similar reasons, even classic works of literature, such as *Lady Chatterley's Lover* by D.H. Lawrence, would be barred from display. *See* Plaintiffs' Exhibit # 2.

Scientific texts would also fall prey to the display provision. For example, a textbook entitled *Human Sexuality* would, by virtue of its illustrations and frank treatment of sexual matters, appeal to the prurient interest of minors. *See* Plaintiff's Exhibit # 16. Simply stated, because display is the critical element in the marketing of books, and because the Act prohibits the display of a significant percentage of adult reading material, the Court finds that the Act would represent a major disruption in the business of bookselling and, as a practical matter, would drastically reduce adults' selection of reading material.

Further exacerbating the chilling effect of the display provision are the practical difficulties booksellers would face in complying with its terms. Approximately 500,000 books are in print at any given time, and 50,000 new books are published every year. Obviously, bookstore owners cannot hope to read more than a minimal percentage of the books they stock. Indeed, books are sold to retailers six to eight months before they are published. In rare instances, a retailer may have access to "galley proofs" before a book is printed in final form, but most books are purchased by retailers based on a synopsis provided by a publisher's catalogue. *See* Plaintiffs' Exhibit #1. These terse descriptions do not give a retailer sufficient information to determine whether a book is covered by the Act; consequently, retailers would be

unable to predict the percentage of their incoming inventory that could be displayed. Furthermore, inasmuch as a book that cannot be displayed is unlikely to prove successful, retailers would be hard pressed to determine how many copies to order of a given book. More likely than not, retailers, especially large retailers or nontraditional booksellers,[8] would err on the side of caution, refusing to order any book with a suggestive cover or the works of an author known for sexually explicit prose. One bookstore owner testified that, because it is impossible to review all incoming books, if forced to comply with the Act, he would remove from display the works of authors such as Sidney Sheldon, Jackie Collins, and Harold Robbins, based on their reputations as authors of adult material. The explanation for such drastic action is simple – bookstore owners are unwilling to risk criminal prosecution.[9]

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[8] At least with respect to popular paperback books, the vast majority of commercial outlets are nontraditional booksellers, including supermarkets, variety stores, airport shops, and newsstands.

[9] At trial, defendants argued that, under the current law barring sales of sexually explicit materials to minors, booksellers are already compelled to acquire knowledge of their stock; therefore, the argument goes, the new display provision does not impose any additional burden. In the Court's view, this argument was refuted by the testimony of bookseller Donald Arnold. When asked whether efforts to comply with the display provision would prove more taxing than those needed to comply with the sale provision, Arnold explained the practical differences between the demands of the two provisions. According to Arnold, a bookseller can more easily comply with the sale provision because at the point of sale he has the opportunity to assess the maturity of the purchaser and to review the book selected.

III. *Conclusions of Law*

Plaintiffs contend, *inter alia*,[10] that the Act's display provision is overbroad under First Amendment standards and that the library exception provision violates the Equal Protection Clause of the Fourteenth Amendment. The Court will address these contentions in turn.[11]

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[10] This order addresses only plaintiffs' challenges to the display and exemption provisions. As explained in the Court's order of June 27, 1984,

> the [Act] may be analyzed into five significant components: (1) the *definition* component, § 16-12-102, which defines the kind of materials that are deemed 'harmful to minors' and are subject to the proscriptions set forth in the following sections; (2) the *distribution* component, § 16-12-103(a), which prohibits any person from selling or otherwise furnishing to a minor any material that is harmful to minors; (3) the *exhibition* component, § 16-12-103(b), which prohibits any person from exhibiting to a minor any motion picture, show, or other presentation that is harmful to minors; (4) the *display* component, § 16-12-103(c), which prohibits the display in public places where minors may be present of material that is harmful to minors; and (5) the *exemption* component, § 16-12-104, which exempts certain libraries from coverage under the Act.

590 F.Supp. at 687 (footnote omitted). Plaintiffs have challenged each of the components set forth above, but, for the reasons stated in the June 27, 1984, order, *id.* at 687-92, the Court rejects plaintiffs' contentions with respect to the definition, distribution, and exhibition components of the Act. Plaintiffs also attack the display component on vagueness grounds, but the Court need not reach this issue because it concludes that the provision is substantially overbroad.

[11] The Court has previously determined that plaintiffs have standing to maintain this action and that a "case or

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A. *The Display Provision*

The First Amendment, made applicable to the states by the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), allows content-based restrictions on speech "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 103 S.Ct. 2875, 2879, 77 L.Ed.2d 469 (1983); *see also City of Renton v. Playtime Theatres, Inc.*, ___ U.S. ___, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125 (1975); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). First Amendment protections do not apply to all forms of expression, however.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942) (footnotes omitted).[12]

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controversy" exists within the meaning of Article III of the Unites States Constitution. 590 F.Supp. at 681 n. 1.

[12] In *Chaplinsky*, the Supreme Court declared "fighting words" to be beyond the scope of the First Amendment. Other

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Following the rationale expressed in *Chaplinsky*, the Supreme Court held that the First Amendment does not shield obscenity from state regulation in *Roth v. United States*, 354 U.S. 476, 483-85, 77 S.Ct. 1304, 1308-09, 1 L.Ed.2d 1498 (1957). *See also Erznoznik*, 422 U.S. at 208, 95 S.Ct. at 2272; *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973).

There are, of course, limits to a state's power to classify material as obscene. Under *Miller*, the concept of obscenity is "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24, 93 S.Ct. at 2615. Even where material is obscene under this standard, the state's authority is not unfettered: an individual cannot be prosecuted for viewing obscenity within the privacy of his own home. *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

The state has somewhat broader power to regulate expression if such regulation serves the state's well-established interest in the well-being of its youth. *New York v.*

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classifications of expression are denied constitutional protection "because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *See New York v. Ferber*, 458 U.S. 747, 763-64, 102 S.Ct. 3348, 3358, 73 L.Ed.2d 1113 (1982) (child pornography); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (speech provoking immediate lawless activity).

Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); *see Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944). *Ginsberg* is the seminal case in this context. There the Supreme Court upheld a New York criminal statute that prohibited the sale to minors of sexually explicit material.[13] Relying on the state's interest in the welfare of minors, the Supreme Court expressly approved the concept of "variable obscenity," which allows a state to "accord minors . . . a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see." 390 U.S. at 637, 88 S.Ct. at 1279.

Although *Ginsberg* is the proper starting point for discussion, it is not dispositive of the issues now before the Court. It must be remembered that the statute

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[13] The statute challenged in *Ginsberg* employed a modified version of the standard set forth in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), rejected the *Memoirs* test, however, and enunciated the test quoted in the text of this order. *See supra* at 1552. In the instant case, the Act tracks the *Miller* standard. This case should not be distinguished from *Ginsberg* on these grounds, however; indeed, it seems logical that juvenile obscenity statutes must now employ the *Miller* test. *See Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1391 n. 4 (8th Cir.1985); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1286 n. 4 (10th Cir.1983).

involved in *Ginsberg* did not implicate the First Amendment rights of adults, since it proscribed only the sale of sexually explicit materials to minors while leaving unimpaired adults' access to such material. Conversely, the Georgia Act directly affects access to materials that, although classified as harmful to minors, are protected speech as to adults. Thus, the Act draws into conflict the First Amendment rights of adults and the state's power to supervise the moral development of its youth.

When faced with similar conflicts, courts have employed a balancing test. *Upper Midwest Booksellers*, 780 F.2d at 1389, 1394-95 (8th Cir.1985), *aff'g*, 602 F.Supp. 1361 (D.Minn.1985) ("The question we must address is whether [Minneapolis] has struck an appropriate balance between its legitimate interest in the protection of its young and allowing adults access to material protected under the First Amendment"); *Cruz v. Ferre*, 755 F.2d 1415, 1421 (11th Cir.1985). At one end of the spectrum, statutes are constitutionally infirm if they confine an adult's selection of reading matter to materials suitable for minors. *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957); *see also Youngs Drug Products*, 463 U.S. at 65, 103 S.Ct. at 2879. Where, however, a statute designed to protect minors has only an incidental impact on protected speech, it may be upheld if it qualifies as a reasonable time, place, and manner restriction. *Pacifica Foundation*, 438 U.S. at 748-51, 98 S.Ct. at 3039-41.

Before deciding where in the spectrum the display provision falls, the Court must consider the standards controlling the facial challenge raised by plaintiffs. A statute is facially invalid under First Amendment analysis only if (1) it cannot easily be given a saving construction;

and (2) it has a real and substantial chilling effect on protected speech. *Erznoznik*, 422 U.S. at 216, 95 S.Ct. at 2276. In addition, the Supreme Court has stressed that a statute regarding "conduct plus speech" should not be held unconstitutional unless its overbreadth is substantial when weighed against its valid applications. *Ferber*, 458 U.S. at 766-74, 102 S.Ct. at 3359-64; *Broadrick v. Oklahoma*, 413 U.S. 601, 613-15, 93 S.Ct. 2908, 2916-18, 37 L.Ed.2d 830 (1973); *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1030 (5th Cir.1981)[14]. At least two circuits have concluded that display statutes involve conduct plus speech, rather than "pure speech." *Upper Midwest Booksellers*, 780 F.2d at 1392; *M.S. News Co. v. Casado*, 721 F.2d 1281, 1289 (10th Cir.1983). In the Court's view, display is significantly closer to pure speech than the activities at issue in *Broadrick* (political campaigning) and *Ferber* (child pornography); nonetheless, the Court assumes *arguendo* that the "substantial overbreadth" requirement applies to the instant case.

Judged under the foregoing standards, the display provision is unconstitutional because it unduly hampers an adult's access to protected expression. Under the Act, material cannot be displayed if it fails to pass the *Miller* standard as modified to apply to minors. As noted above, a significant percentage of adult reading would be barred from display pursuant to this standard, and books that cannot be displayed are unlikely to attract the attention

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[14] *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (decisions rendered by the former Fifth Circuit before October 3, 1981, are binding upon the courts of the Eleventh Circuit).

of the public. Consequently, a bookseller, exercising sound business sense, might well decide not to carry such books; in fact, if display provisions of this type became widespread, publishers could be deterred from publishing books featuring sexually frank prose. The practical difficulties booksellers would face in complying with the display provision would also chill the exercise of First Amendment rights.[15] It is simply not feasible for a bookseller to acquire adequate knowledge of his entire inventory to determine which materials could be classified as harmful to minors. Rather than risk prosecution, many booksellers would remove from display any book arguably within the ambit of the Act.[16] In sum, the display provision's overbreadth far outweighs its valid applications.

Defendants assert that potential limiting constructions of the display provision eliminate any constitutional infirmity. The Court concludes, however, that a limiting

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[15] It is true that, because the display provision applies only to places "frequented by minors or where minors are or may be invited as part of the general public," O.C.G.A. § 16-12-103(e), a bookseller could comply with the Act by closing his doors to minors. In addition to the disquieting aspects of such a course, this option is not viable for a great many retail outlets. *See supra* at n. 8. Moreover, many adults would be reluctant to enter an "adults only" bookstore.

[16] Defendants maintain that the Act's scienter requirement diminishes any chilling effect. The Court disagrees for two reasons. First, knowledge is defined broadly under the Act. *See* O.C.G.A. § 16-12-102(2). Second, according to the bookstore owners' testimony, the chilling effect results, in large measure, from the threat of prosecution; the prospect of acquittal offers little comfort.

construction is not readily available, for the provision suffers from too many flaws. Construing a statute narrowly is a proper course, but a court may not, as defendants here have requested, redraft legislation. *Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir.1978) (en banc), *aff'd per curiam*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *American Booksellers Association v. McAuliffe*, 533 F.Supp. 50 (N.D.Ga.1981).

Moreover, the limiting constructions offered by defendants would not save the display provision as it is currently drafted. Defendants maintain that the provision should be read to exclude from coverage books displayed in an "adults only" section or books covered with blinder racks or adults only tags. There are several problems with these suggestions. First, there is nothing in the Act or its legislative history to suggest this type of construction.[17] Second, based on the testimony at trial, it appears that even the compliance methods suggested by defendants would produce a chilling effect.[18] In the Court's view, the

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[17] Similarly, defendants have not offered any support for the contention that under the Act materials can be displayed if they hold literary value for anyone under the age of eighteen. Such a provision would go a long way toward curing the Act's defects, however.

[18] As the Fourth Circuit explained in *American Booksellers Association v. Virginia*, 792 F.2d 1261, 1266 (4th Cir.1986), *aff'g*, 617 F.Supp. 699 (E.D.Va.1985),

> Forcing a bookseller to create to a separate, monitored adults only section, requiring that the materials be sealed, or taking the materials off display and keeping them "under the counter" unreasonably interferes with the booksellers' right to sell the

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chilling effect attendant to the compliance methods suggested by defendants might be acceptable if the display provision applied only to material on the fringe of protected expression. But, as developed above, it applies with full force to classic works that are well within the protection of the First Amendment. Furthermore, there is no way to predict which, if any, of the modifications offered by defendants the Georgia courts will accept. As has often been stated, "[b]ecause First Amendment freedom needs breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), regulation in the area of free speech must be reasonably precise. Here, the Act fails to "guide [booksellers] in deciding what are the least restrictive modifications in display methods which would be sufficient to satisfy the statute." *American Booksellers Association v. Virginia*, 792 F.2d 1261, 1266 (4th Cir.1986), *aff'g*, 617 F.Supp. 699 (E.D.Va.1985). Therefore, the Court concludes that the display provision cannot be saved by limiting constructions.

Nor can it be upheld as a reasonable time, place, and manner restriction. To qualify as a reasonable time, place, and manner restriction, a statute must be narrowly drawn and satisfy three criteria: (1) it cannot be based on content

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restricted materials and . . . adults' ability to buy them. Many adults, for a variety of reasons, would not enter a display area identified as "for adults only." Selling materials in sealed wrappers or from under the counter would unrealistically limit access by adults and would significantly interfere with the Booksellers' business practices.

or subject matter; (2) it must further a significant governmental interest; and (3) it must allow for alternate forums of expression. *Playtime Theatres*, 106 S.Ct. at 928-931; *Regan v. Time, Inc.*, 468 U.S. 641, 104 S.Ct. 3262, 3266-3267, 82 L.Ed.2d 487 (1984); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3068-3069, 82 L.Ed.2d 221 (1984). The United States Supreme Court has labored to define the dictates of the first requirement. *Playtime Theatres*, 106 S.Ct. at 929-930; *Young v. American Mini Theatres*, 427 U.S. 50, 69-71, 96 S.Ct. 2440, 2452-2453, 49 L.Ed.2d 310 (1976); *see also id.* at 82, n. 6, 96 S.Ct. at 2458, n. 6 (Powell, J., concurring). Ruling on a First Amendment challenge to a zoning ordinance regulating the location of "adult theaters," the *Playtime Theatres* Court concluded that a restriction is content-neutral if it is concerned with the "secondary effects" of the speech at issue (e.g., the negative impact of adult theaters on a neighborhood's environment), rather than with eradicating a particular type of speech. *See also International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir.1986). Under *Playtime Theatres*, there must be some evidence in the record to substantiate a finding that the regulated speech produces negative secondary effects. 106 S.Ct. at 930-31.

For several reasons, the display provision fails to qualify as a reasonable time, place, and manner restriction. As a preliminary matter, that the provision applies to a significant percentage of adult reading material demonstrates that it is not narrowly drawn. Beyond that, the provision plainly imposes content-based restrictions. It is arguable that, in light of *Playtime Theatres* and *American Mini Theatres*, content-based display regulations can be

enacted to combat the deleterious "secondary effect" sexually explicit materials may have on minors. If established, such an effect would undoubtedly constitute a significant governmental interest. In the instant case, however, defendants failed to submit any evidence suggesting that the limited contact a minor may have with materials displayed in a bookstore produces a negative effect.[19] Furthermore, the Act does not allow for reasonable alternative forums or methods of communication. In *Playtime Theatres* and *American Mini Theatres*, the challenged zoning ordinances controlled only the placement of adult theaters; in appropriately zoned areas, adult

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[19] In *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), the Supreme Court required only that New York cite a rational basis for concluding that sexually explicit materials are harmful to minors. As discussed above, however, the First Amendment rights of adults were not implicated in *Ginsberg*. Nor were the constitutional rights of minors infringed by the statute at issue, since the concept of variable obscenity did not, in itself, violate minors' rights, and since the materials affected by the statute were not protected by the First Amendment as applied to minors. *See Roth v. United States*, 354 U.S. 476, 483-85, 77 S.Ct. 1304, 1308-09, 1 L.Ed.2d 1498 (1957). In contrast to the situation in *Ginsberg*, the First Amendment rights of adults are implicated here. Thus, the evidentiary standard followed in *City of Renton v. Playtime Theatres, Inc.*, ___ U.S. ___, 106 S.Ct. 925, 930-31, 89 L.Ed.2d 29 (1986), is controlling. Furthermore, *Ginsberg* is distinguishable from the instant case. It is one thing to say that an unlimited right to purchase and view sexually explicit materials would be harmful to minors; it is quite another to suggest that the mere display of materials will prove damaging. The Court does not deny that the latter proposition is plausible, but it is incumbent upon the state to cite some factual support for its view if the Act is to be upheld as a reasonable time, place, and manner restriction.

theaters were free to operate in any manner consistent with First Amendment protections. Here, the Act applies to all book retailers within Georgia, and, as discussed above, the methods of display left available in the wake of the Act do not adequately serve the interests of free speech.

B. *The Library Exception*

Pursuant to O.C.G.A. § 16-12-104, "any public library operated by the state or any of its political subdivisions [or] . . . library operated as part of any school, college, or university" is exempt from the provisions of the Act. Plaintiffs contend this classification violates the Equal Protection Clause. The Court agrees.

The critical step in Equal Protection analysis is determining the proper standard of review. The Tenth Circuit applied the rational basis test in upholding an exception to a display statute in *M.S. News Co.*, 721 F.2d at 1291-92. In *Upper Midwest Booksellers*, 602 F.Supp. at 1373-74, the court declined to follow *M.S. News Co.* and instead applied the strict scrutiny test in passing on the constitutionality of a statutory exception to a display provision. The Court concludes that the approach followed in *Upper Midwest Booksellers* is correct.

It has long been held that where a classification infringes on a fundamental right, such as freedom of speech, the strict scrutiny test is applicable. *Attorney General of New York v. Soto-Lopez*, ___ U.S. ___, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); *Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1049 (2d Cir.1975). Under

strict scrutiny analysis, a classification is unconstitutional unless the state can show that it is necessary to promote a compelling governmental interest. *E. g., Shapiro*, 394 U.S. at 634, 89 S.Ct. at 1331. The only governmental interest asserted in this case is the state's interest in protecting minors from arguably harmful materials. Defendants have not suggested any way in which the library exception is necessary to serve this interest.[20] Accordingly, the library exception cannot stand.

The only remaining issue is the scope of the relief to which plaintiffs are entitled. Plaintiffs contend that, if any provision of the Act is unconstitutional, the entire Act must fall. The Georgia legislature has, however, created a general presumption of severability. O.C.G.A. § 1-1-3. In addition, although divining legislative intent is never an exact science, the Court has little trouble concluding that the legislature would desire to have the definition, distribution, and exhibition provisions of the Act severed from the unconstitutional display provision. The library exception presents a significantly closer question, however. Arguably, severing the library exception from the remainder of the Act would contravene the legislature's intention to exempt libraries from criminal liability. It is

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[20] The only justification defendants offered for the library exception is that the legislature could rationally distinguish between commercial and noncommercial institutions. Defendants have not contended that this argument withstands strict scrutiny analysis, but instead argued that the rational basis test is controlling. Still, it is worth noting that the legislature apparently rejected the commercial/noncommercial distinction in amending the Act, as indicated in the Appendix to this order. *See* O.C.G.A. § 16-12-103(a) and (b).

possible, however, that once the display provision is stricken libraries would face little practical risk of prosecution. The existing record fails to address this issue adequately. Now that the scope of the Court's ruling on the constitutional issues is clear, the parties will be better able to address the issue of severability.

IV. *Conclusion*

It is, of course, far from simple to strike an appropriate balance between the weighty interests implicated by the Act. The Court is certain that the Act represents a good faith effort by the legislature to protect the youth of Georgia. The evil in the Act is not its purpose, but rather its breadth. In the Court's view, a display statute that applied only to materials inappropriate for minors approaching the age of majority might well survive a constitutional attack. Any protected speech that fell within the terms of such a statute would surely be at the fringe of First Amendment rights. Reasonable alternative means of display would also be necessary for any display statute. At trial, the Attorney General and a state legislator who sponsored the Act represented that it was aimed primarily at slick and graphic magazines. The Court has little doubt that, consistent with the demands of the First Amendment, it is possible to draft a statute that restricts to a reasonable extent the display of such magazines.[21] But it is not for the Court to construct such a statute. The

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[21] In addition, it is worth noting that a great number of the magazines defendants claimed to be the target of the Act could probably be prohibited from sale, as well as display, under the *Miller* standard. *See, e.g.* Defendants' Exhibits 9, 10, and 13.

Court has pointed out the Act's deficiencies and suggested ways in which those deficiencies can be corrected; the legislature must now decide which options to enact.

In sum, the Court DECLARES the display provision and the library exception unconstitutional. Plaintiffs are allowed twenty days from the date of this order in which to address the issue of severability. Defendants are allowed twenty days thereafter in which to respond. Until the severability issue is resolved, the Court's preliminary injunction shall remain in effect.[22]

* * *

[22] The Court wishes to acknowledge the skill and professionalism with which counsel for both sides litigated this case.

APPENDIX 5

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al., Plaintiffs,

v.

James WEBB, et al., Defendants.

Civ. A. No. C84-697A.

United States District Court,
N.D. Georgia,
Atlanta Division.

Feb. 20, 1987.

ORDER

SHOOB, District Judge.

This order will resolve the sole remaining issue in plaintiffs' challenge to O.C.G.A. §§ 16-12-102 – 16-12-104 (the "Act"). By order dated September 26, 1986, the Court declared unconstitutional the Act's display provision and the library exception. 643 F.Supp. 1546. Throughout the course of this case, plaintiffs have maintained that, if any portion of the Act is unconstitutional, the entire Act must fall. Addressing this issue in its previous order, the Court stated the following:

> The Georgia legislature has . . . created a general presumption of severability. O.C.G.A. § 1-1-3. In addition, although divining legislative intent is never an exact science, the Court has little trouble concluding that the legislature would desire to have the definition, distribution, and exhibition provisions of the Act severed from the unconstitutional display provision. The library exception presents a significantly closer question, however. Arguably, severing the library exception from the remainder of the Act would

> contravene the legislature's intention to exempt libraries from criminal liability. It is possible, however, that once the display provision is stricken libraries would face little practical risk of prosecution. The existing record fails to address this issue adequately. Now that the scope of the Court's ruling on the constitutional issues is clear, the parties will be better able to address the issue of severability.

Id. at 1556.

The parties have filed the required briefs, and the Court has concluded that the entire statute must fall because of the library exception. Although it is true that striking the display provision greatly reduces the risk of prosecution facing libraries, it is possible that libraries could be prosecuted under the distribution provision.[1] In light of this possibility, the presumption of severability is of little help here. *See, e.g., United States v. Jackson*, 390 U.S. 570, 585 n.27, 88 S.Ct. 1209, 1218 n. 27, 20 L.Ed.2d 138 (1968). Indeed, the presumption is rebutted by a cardinal rule of statutory construction.

As defendants concede, there is a general rule providing that where, as here, an exception to a criminal statute is invalid, the entire criminal statute must be struck. *Georgia Southern & Florida Railway Co. v. Odom*, 242 Ga. 169, 249 S.E.2d 545 (1978); *see also Davis v. Wallace*, 257 U.S. 478, 42 S.Ct. 164, 66 L.Ed. 325 (1922); Sutherland Stat.

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[1] That provision provides that "[i]t shall be unlawful for any person knowingly to sell or loan for monetary consideration *or otherwise furnish or disseminate to a minor*" certain "harmful materials." O.C.G.A. § 16-12-103(a) (emphasis added).

Const. § 44.13 (4th Ed.). The reason for this is simple: by enacting an exception, a legislature manifests an intent to exempt a protected class from criminal liability. Thus, in this case, allowing the Act to stand without the library exception would contravene the legislature's intent by expanding the ambit of criminal liability.[2]

Even though the Court has concluded that the library exception is not severable, it is reluctant to strike the

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[2] Defendants have advanced a creative but unconvincing argument based on the history of statutes similar to the Act. According to defendants, the legislature intended that the library exception apply only to the display provision. This intent, defendants argue, is revealed by comparing the 1981 version of the Act, which included neither a display provision nor a library exception, with the 1969 version, which included both a display provision and a library exception. 1981 Ga. Laws 1578, 1580; 1969 Ga. Laws 222, 223, 225. The Court rejects this argument for several reasons. First, the plain language of the library exception indicates that it applies to the Act as a whole. O.C.G.A. § 16-12-104. Second, contrary to defendants' assertion, it appears that the 1981 statute did apply to displays of sexually explicit materials, since it prohibited "showing" such material to minors. Third, as defendants concede, because "the 1981 statute was arguably limited to commercial or 'business' distributions," the legislature may well have concluded that no library exception was needed. Defendants' Supplementary Brief on Severability at 11 n.2. Fourth, it is difficult to discern the logic behind confining the library exception's application to the terms of the display provision.

Defendants also contend that there is no evidence that libraries stock materials covered by the Act, but their contention is based on an overly narrow interpretation. As the Court concluded in its earlier order, the Act's definition of the term "harmful to minors" applies to a significant percentage of adult reading material.

constitutional definition, exhibition, and distribution provisions. These provisions represent a valid attempt by the legislature to protect the youth of Georgia from unsuitable materials. The Court had anticipated that the legislature would enact an amendment that would render moot the severability issue. Defendants have reported, however, that no such amendment is pending and that an appeal is planned. Under these circumstances, although plaintiffs are entitled to injunctive relief as to all provisions of the Act, the Court thinks it advisable to stay until the resolution of the appeal that portion of the injunction involving the constitutional definition, exhibition, and distribution components. Such a stay will enable defendants to continue enforcing the constitutional provisions of the Act, and, as conceded by plaintiffs, will not result in prejudice to booksellers or adult consumers.[3]

In sum, the Clerk is DIRECTED to enter judgment enjoining the enforcement of the Act. That judgment shall be STAYED pending appeal with respect to the definition, exhibition, and distribution components of the Act.

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[3] As counsel for defendants stated at oral argument, the legislature's decision not to enact a curative amendment has created a risk that the state could find itself without a statute barring the sale of sexually explicit materials to minors. Even if the Eleventh Circuit were to reverse the Court's order with respect to the display provision, an affirmance on the library exception and severability issues would result in the entire Act being struck. There are several options the legislature could follow to prevent such a result. One option is to provide specifically that the library exception is severable.

APPENDIX 6

AMERICAN BOOKSELLERS, et al.,
Plaintiffs-Appellees,

v.

James WEBB, et al.,
Defendants-Appellants.

No. 87-8199.

United States Court of Appeals,
Eleventh Circuit.

Dec. 27, 1990.

Before KRAVITCH, Circuit Judge, HILL, Senior Circuit Judge*, and POINTER, Chief District Judge**.

HILL, Senior Circuit Judge:

INTRODUCTION

I. STATEMENT OF THE CASE

As stated in the district court order from which this appeal is taken, "[t]his case presents a conflict between one of society's most cherished rights – freedom of expression – and one of government's most profound obligations – the protection of minors." *American Booksellers Ass'n v. Webb*, 643 F.Supp. 1546, 1547 (N.D.Ga. 1986) (hereinafter "*Webb II*"). Plaintiff-appellees obtained declaratory and injunctive relief barring the enforcement of a Georgia law which regulates, *inter alia*, the display of

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Sam C. Pointer, Jr., Chief U.S. District Judge for the Northern District of Alabama, sitting by designation.

material deemed "harmful to minors." The District Court for the Northern District of Georgia interpreted the statute to "reduce an adult's selection of reading materials to a book list suitable for a fifth-grade class" and declared the statute unconstitutional on its face. *Id.* at 1548. We find that the statute is readily susceptible to a narrowing construction that reduces the scope of materials covered, produces only a slight burden on adults' access to protected material,[1] and fully comports with the First Amendment. We also reverse the district court's determination that an exemption granted in the statute to libraries is subject to strict scrutiny and violates the Equal Protection Clause.

A. *Background*

On April 5, 1984, the Governor of Georgia signed into law Act No. 1319, 1984 Ga.Laws 1495, 1496-1501, which was to take effect on July 1, 1984. Section 3 of the Act, which is codified at O.C.G.A. §§ 16-12-102 to 16-12-104 (1988),[2] regulates the distribution and display of sexually

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[1] The display ban implicates not only the right of adults to have access to material protected by the First Amendment, but also the interests of authors, publishers, booksellers, and others affected by a law regulating consumer access to books and other material covered by the statute. For the sake of brevity, we will refer throughout this opinion to "adults' access" as a shorthand expression denoting all of the interests affected by the statute.

[2] The statutory provisions relevant to this appeal, O.C.G.A. §§ 16-12-102 to 16-12-104 are set forth in the Appendix to this opinion.

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explicit materials deemed "harmful to minors" under the definition provided in section 16-12-102.

It may be useful to analyze the challenged statutory provisions as a group of five distinct components: (1) the *definition* in section 16-12-102 of the type of materials deemed "harmful to minors" and subjected to the proscriptions set forth in section 16-12-103; (2) the ban in section 16-12-103(a) on the *distribution* (in this case, the sale or loan) to a minor of any material "harmful to minors"; (3) the ban in section 16-12-103(b) on the *exhibition* to a minor of any motion picture, show, or other presentation that is "harmful to minors"; (4) the prohibition in section 16-12-103(e) on the *display* in public places where minors may be present of material that is "harmful to minors"; and (5) in section 16-12-104, the exemption from coverage under the statute of certain libraries in the state of Georgia. *See American Booksellers Ass'n., v. Webb*, 590 F.Supp. 677, 687 (N.D. Ga.1984) (district court order to abstain and grant interim injunctive relief) (hereinafter *"Webb I"*) (describing the five component parts of the statute); *Hunter v. State*, 257 Ga. 571, 571-72, 361 S.E.2d 787, 787 (1987) (same).

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Sections 1 and 2 of the Act amended O.C.G.A. §§ 16-6-4 and 16-6-5, which relate to the criminal sexual offenses of, respectively, child molestation and enticing a child for indecent purposes.

Except where noted by the context, as used hereinafter in this opinion the terms "the Act," "the statute," or "the statutory provisions" will refer to sections 16-12-102 to 16-12-104.

The definition of "harmful to minors" in section 16-12-102 derives from a New York statute that the Supreme Court upheld in *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).[3] *Ginsberg* approved the use of a "variable obscenity standard," *see id.* at 636-639, 88 S.Ct. at 1278-80 – an adaptation of the general standard for determining adult obscenity to reflect the "prevailing standards in the adult community as a whole with respect to what is suitable material for minors." *Id.* at 639, 88 S.Ct. at 1280 (quoting N.Y.Penal Law § 484-h).[4] Five years after the Court decided *Ginsberg*, it revised the standard for determining adult obscenity in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Section 16-12-102 modifies the *Ginsberg* test for determining material obscene as to minors in light of the three-part test articulated in *Miller* for determining adult obscenity.[5]

An accused must "knowingly" violate the statute's various proscriptions. *See* O.C.G.A. §§ 16-12-103(a), (b), and (e), and 16-12-102(2). Section 16-12-103(c) also makes it unlawful for any minor falsely to represent that he or

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[3] The New York statute upheld in *Ginsberg* banned only the sale or distribution to minors of material "harmful to minors."

[4] In general, material is not "harmful to minors" under the Georgia statute unless it (1) taken as a whole, appeals to the prurient interest of minors, (2) is patently offensive to standards in the adult community with regard to what is suitable for minors, and (3) taken as a whole, lacks serious value. *See* O.C.G.A. § 16-12-102(1).

[5] For a more detailed discussion of the changes to the *Ginsberg* formulation wrought by *Miller*, see footnote 18.

she is 18 years of age or older with the intent to procure any material covered by the statute.

B. *Procedural History*

1. The suit to enjoin.

Plaintiff-appellees are various associations of booksellers, publishers, periodical distributors, college bookstores, and retailers, as well as two general bookstores and an author.[6] On April 6, 1984, the day the Governor signed the bill into law, plaintiffs filed their complaint seeking declaratory and injunctive relief. The defendant-appellants are various Georgia solicitors, sheriffs, and police officials who have authority to enforce the law.[7]

Plaintiffs alleged that the statutory provisions in question violated the First, Fifth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983.[8] Plaintiffs also alleged that the legislature's choice

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[6] *See Webb I*, 590 F.Supp. at 681, n. 1, and 689-90, for a discussion of plaintiffs' standing.

[7] The Attorney General of Georgia is not named as a defendant, but was served with a copy of the proceedings pursuant to O.C.G.A. section 9-4-7(c) and retained a special assistant attorney general to act as lead counsel for most of the defendants. *See Webb I*, 590 F.Supp. at 681 n.2. The district court determined that all state law enforcement officials are bound by the outcome of this case. *Id.* at 693.

[8] Count I of the complaint alleged that the bans on distribution and display are unconstitutionally overbroad because they apply to materials that are not obscene as to minors. Count II alleged that the display provision violates adults' First Amendment right of access to materials that are not

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to include in a single enactment provisions relating to sexual offenses against children (Sections I and II of the Act, see footnote 2), together with provisions regulating material "harmful to minors" (Section III of the Act), violated Article III, Section V, Paragraph III of the Georgia Constitution – the rule against referring to more than one subject matter in the same bill.

Since the Act was not scheduled to become effective until July 1, 1984, *see* O.C.G.A. § 1-3-4(a) (governing effective date of legislative acts), the district court consolidated the hearing on plaintiff's motion for a preliminary injunction with a trial on the merits on May 31 – June 1, 1984.

2. *Pullman* abstention and the certification of questions to the Georgia Supreme Court.

By order dated June 27, 1984, the district court granted defendant's motion to abstain under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), until the Georgia courts decided whether the Act violated the "one subject matter" provision of the Georgia Constitution. The court did however

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obscene as to them. Count III alleged that the statute effects an unconstitutional prior restraint on speech. Count IV alleged that the definition of "harmful to minors" contained in the statute is unconstitutionally vague. Count V alleged that the exemption for libraries violates the Equal Protection Clause. Count VI alleged that the statute violates a parent's right to raise his or her child free from state interference. Count VII is the state law count described in the text below. *See Webb I*, 590 F.Supp. at 682.

grant temporary relief to plaintiffs by enjoining the display ban. *Webb I*, 590 F.Supp. at 693-94. In the interest of judicial economy, the court suggested that Appellants also seek a construction of the challenged provisions in the Georgia courts.

Plaintiffs appealed to this court, which granted the parties' joint motion to present two certified questions to the Georgia Supreme Court. *American Booksellers Ass'n v. Webb*, 744 F.2d 784 (11th Cir.1984).

The Georgia Supreme Court answered the first question by holding that the Act did not violate the "one subject matter" provision of the Georgia Constitution; but the court declined to construe O.C.G.A. §§ 16-12-102 to 16-12-104 in the absence of enforcement facts, finding instead that the challenge was anticipatory. *American Booksellers Ass'n v. Webb*, 254 Ga. 399, 329 S.E.2d 495 (1985).

3. The district court's decision on the merits.

On September 26, 1986, on the basis of the factual evidence and legal arguments presented at trial, the district court declared the display provision and library exemption of the statute unconstitutional. *Webb II*, 643 F.Supp. at 1556. The court ruled on February 25, 1987, that since the library exemption is not severable from the definition, distribution, exhibition, and display provisions, the entire statute is invalid. *American Booksellers Ass'n v. Webb*, 654 F.Supp. 503 (N.D.Ga.1987).[9] The court

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[9] Proceedings in this court were stayed from February 8, 1988 until December 6, 1988, due to the pendency of a case in

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nevertheless stayed that portion of its injunction involving the definition, distribution, and exhibition provisions of the statute pending this appeal.

a. findings of fact

The district court found "that in-store display of books is the cornerstone of the [bookselling] industry's marketing practices. Relatively few books are advertised through the mass media, and, as a result, the vast majority of sales are impulsive selections prompted by a display." *Webb II*, 643 F.Supp. at 1549. The court also found as matter of fact that approximately 500,000 books are in

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the United States Supreme Court involving similar issues. *Virginia v. American Booksellers, Ass'n*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (certifying questions to the Virginia Supreme Court); 488 U.S. 905, 109 S.Ct. 254, 102 L.Ed.2d 243 (1988) (vacating earlier decision and remanding the case to the Fourth Circuit for reconsideration in light of the answers received). *See also American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir.1989) (upholding facial validity of display regulation as interpreted by Virginia Supreme Court).

Unfortunately, the final Fourth Circuit decision does not provide us substantial guidance. The 1.5 page opinion aids our analysis only in part. While it aids our construction of the Georgia statute's phrase "harmful to minors" (see below at page 1505), the opinion does not aid our analysis of the compliance strategies mandated by section 16-12-103(e) (see below at footnote 31 and accompanying text). Furthermore, the opinion decided the vagueness issue but did not delve into overbreadth or the relationship between the vagueness and overbreadth doctrines, as we do in Part IV.

print at any given time and 50,000 new books are published every year; therefore, booksellers "cannot hope to read more than a minimal percentage of books that they stock." *Id.* at 1550.

b. conclusions of law

The court made various legal interpretations regarding the coverage of the statute's "harmful to minors" definition and thus the reach of the ban on display. Although several of its findings were noted as "findings of fact," *see id.* at 1549-51, the parties agree that "the district court's determinations as to the scope of the phrase 'harmful to minors,' and its specific applicability to particular works" are mixed questions of law and fact. Appellees' Brief at 11-12. *See* Appellants' Brief at 11.[10] The district court found that "a significant percentage of an average bookstore's inventory would be barred from display" by the statute, *id.* at 1549, and " 'that the predominate amount of all adult reading material, fiction and nonfiction, could arguably be encompassed within the terms of [the Act].' " *Id.* at 1550 (quoting witness Florence). The court made these observations on the basis of its interpretation that the "serious value" prong of the "harmful to minors" definition must be evaluated in light of what "most minors," including the youngest potential readers, could understand and appreciate. *Id.*

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[10] *See also McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir.1985). ("In reviewing findings of fact in First Amendment cases, this Court must make an 'independent examination of the whole record,' rather than relying solely on the 'clearly erroneous' standard.") (citations omitted).

The court declined to construe section 16-12-103(e)'s requirement that a person must not "knowingly . . . exhibit, expose, or display in public . . . at any . . . public place frequented by minors or where minors are or may be invited as part of the general public: [any material subject to the statute]." Rather than determining the least burdensome compliance strategy actually mandated by this language and then evaluating its constitutionality, the court held that displaying material in an adults-only section of a store open to minors, or covering books with blinder racks or adults-only tags, "would not save the display provision as it is currently drafted" since, given the court's earlier interpretation of the vast amount of works covered by the statute, these strategies "would produce a chilling effect." *Id.* at 1554.

Similarly, the court found that the statute was not a reasonable time, place, and manner restriction since (1) "the methods of display left available in the wake of the Act do not adequately serve the interests of free speech," and (2) defendants failed to submit sufficient evidence that "the limited contact a minor may have with materials displayed in a bookstore produces a negative [secondary effect of speech]" that the state may regulate. *Id.* at 1555.

The court noted, however, that "the chilling effect attendant to the compliance methods suggested by the defendants might be acceptable if the statute did not apply to "classic works of literature" and the predominant amount of adult reading material. *Id.* at 1554. In fact, as the court stated, "a display statute that applies only to materials inappropriate for minors approaching the age of majority might well survive a constitutional attack." *Id.* at 1556. *See also id.* at 1554 n. 17.

Finally, the court found that the statutory exemption provided to libraries is a classification infringing upon a fundamental right. Since the strict scrutiny test is applicable under the Equal Protection Clause to classifications affecting the exercise of fundamental rights, and the government failed to demonstrate that the library exemption promoted a compelling governmental interest through a narrowly drawn classification, the court found the exemption unconstitutional.[11]

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[11] The district court's September 26, 1986, order addressed only plaintiffs' chailenges to the display and library exemption provisions of the statute.

The court relied on the reasons stated in its June 27, 1984, order, *see Webb I*, 590 F.Supp. at 687-92, to "reject[ ] plaintiffs' contentions with respect to the definition, distribution, and exhibition components of the Act." *Webb II*, 643 F.Supp. at 1551 n. 10. Appellees have not argued on appeal that the district court was incorrect to reject these alleged constitutional infirmities; thus, we do not address these arguments as alternative grounds for upholding the district court's determination that the Act is unconstitutional.

Since it concluded that the display provision was substantially overbroad, the district court declined to reach plaintiffs' contention that the display component is unconstitutionally vague. Appellees have not argued on appeal that any of the provisions in question fail to provide the fair notice required under the Due Process Clause as to what constitutes a criminal offense under the Act; therefore, we need not address that claim either. Appellees have argued, however, that booksellers face an intolerable First Amendment burden in determining which materials are "harmful to minors" under the statutory definition in section 16-12-102. We address that claim at pp. 1505-1506.

C. *Issues on Appeal*

This appeal requires us first to determine whether the reach of the "harmful to minors" definition in section 16-12-102 must be evaluated from the perspective of "any reasonable minor," including an older minor, or whether the tests must be applied in light of the sensibilities and literary comprehension of "most" minors, the "average," or even the youngest minor who might seek access to books or other materials with explicit sexual conduct. Second, we must evaluate the burden on protected speech in light of (1) our interpretation of the amount of material covered and (2) the methods of compliance actually mandated by the ban on display. Finally, we will decide the appropriate standard of review for the classification drawn by the Georgia legislature regarding who may distribute and display to minors material covered by the Act, and who may not.

DISCUSSION

II. REVIEWING A FIRST AMENDMENT REGULATION FOR FACIAL VALIDITY

Before considering the specific test or standards by which we must measure the constitutionality of the display ban, it is important to articulate the general interpretive principles applicable in a facial challenge to a statute affecting speech. Outside of the First Amendment context, the Supreme Court has noted the difficulties inherent in a facial challenge:

> that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish

> that no set of circumstances exist under which the Act would be valid. The fact that [the challenged statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . . "

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).

The Court has recognized that when overly broad statutory language seems to sweep protected First Amendment expression directly into the scope of a regulation affecting speech, or indirectly places an undue burden on such protected activity, free expression can be chilled even in the absence of the statute's specific application to protected speech. For this reason, the Court has recognized the so-called overbreadth doctrine in the limited context of First Amendment facial challenges. *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). Since the overbreadth doctrine in effect requires courts to evaluate the *potential* reach of a statute, *conceivable* sets of circumstances, and *possible* direct and indirect burdens on speech,[12] "[t]he Supreme Court has noted that the overbreadth doctrine is 'strong medicine' that should be employed only 'with hesitation, and then "only as a last resort." ' " *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1391 (8th Cir.1986) (quoting *New York v. Ferber*, 458 U.S. 747, 769, 102 S.Ct. 3348, 3361, 73

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[12] *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 6, 102 S.Ct. 1186, 1191 n. 6, 71 L.Ed.2d 362 (1982) (quoting *Bagget v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1322-23, 12 L.Ed.2d 377 (1964); (in turn quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)).

L.Ed.2d 1113 (1982) (in turn quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916-17, 37 L.Ed.2d 830 (1973)).

When the regulation is not directed at the origin of expression, or at the ultimate right of a person (in this case, an adult) to present or procure protected expression, it does not impinge upon "mere speech"; rather, it regulates the method of presenting, or the form of, expression. Regulations on display affect "conduct plus speech." *Upper Midwest Booksellers*, 780 F.2d at 1391-92; *M.S. News Co. v. Casado*, 721 F.2d 1281, 1289 (10th Cir.1983); *American Booksellers Ass'n v. Rendell*, 332 Pa. Super. 537, 581, 481 A.2d 919, 941 (1984). "[W]hen conduct plus speech is involved, the overbreadth must be 'real' and 'substantial' in relation to [the regulation's] 'plainly legitimate sweep' before the [regulation] should be invalidated on its face." *Upper Midwest Booksellers*, 780 F.2d at 1391-92 (quoting *Ferber*, 458 U.S. at 770, 102 S.Ct. at 3361-62).

As the Supreme Court recently stated when considering a facial challenge to a Virginia regulation on the display of materials "harmful to juveniles," courts have an obligation to construe the challenged statute narrowly:

> It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The key to application of this principle is that the statute must be "readily susceptible" to limitation. We will not rewrite a state law to conform it to constitutional requirements.

Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397, 108 S.Ct. 636, 644-45, 98 L.Ed.2d 782 (1988).[13] Thus, we must consider the allegations of the potential range of materials covered by the statute, and the possible burdens on adults' access imposed by mandatory compliance measures, in light of our twin obligations to (1) construe the statute narrowly, (2) without rewriting its terms.

III. FIRST AMENDMENT STANDARDS

We decline to restate the bedrock case law and general principles of First Amendment jurisprudence which guide our analysis. We are content to note that (1) content-based restrictions on speech survive constitutional scrutiny only under extraordinary circumstances; but (2) material judged "obscene" under the appropriate constitutional standard is not protected by the First Amendment; (3) indirect burdens placed on protected speech in an effort to regulate obscenity must be supported by important state interests and should not be unnecessarily

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[13] In its last term, the Supreme Court upheld a statute which prohibited the possession of "nude" photographs of minors, subject to several exemptions and "proper purposes" provisions. *Osborne v. Ohio*, ___ U.S. ___, 110 S.Ct. 1691, 109 L.Ed.2d 98 (citation omitted). The Court noted that "depictions of nudity, without more, constitute protected expression." 110 S.Ct. at 1698 (citing *Ferber*, 458 U.S. at 765 n. 18, 102 S.Ct. at 3359 n. 18). And given the broad language, "it takes no great feat of imagination to envision situations in which such an ordinance might be unconstitutionally applied." 110 S.Ct. at 1701. However, since the Ohio Supreme Court read the statute as requiring "a lewd exhibition or . . . a graphic focus on the genitals," the Court upheld the statute against an overbreadth challenge.

burdensome; and (4) the state's interest in protecting its youth justifies a limited burden on free expression. *See generally Webb II*, 643 F.Supp. at 1551-52 (and cases cited therein).

We begin our analysis with the Supreme Court's decision in *Ginsberg* that a state may deny minors access to materials acceptable for adults but obscene for minors. While the statute in *Ginsberg* banned only the *sale* or *distribution* of this material to minors and did not implicate the First Amendment rights of adults, it is clear from our reading of *Ginsberg* that a state may, absent an impermissible burden on adults, deny minors all access *in any form* to materials obscene as to them. Minors have no right to view or in any way consume this material – even if they do not purchase or otherwise take control of it.[14]

Ginsberg did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them. We must look to other case law and general principles of First Amendment jurisprudence to discern the constitutional parameters of the government's power under these circumstances. First, it is clear that a state may not prohibit an adult's access to material that is

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[14] The New York statute upheld in *Ginsberg* extended beyond the sale of such objectionable materials to its exhibition or presentation to minors. *See* N.Y.Penal Law § 484-h, *construed in Ginsberg*, 390 U.S. at 647, 88 S.Ct. at 1284-85. It would be quite anomalous for a court to find that while minors have no right to *purchase* material unprotected to them, they nevertheless have a right to read or otherwise consume the material without taking permanent control over it as their own property.

obscene for minors but not for adults. As the Supreme Court recently reiterated, the First Amendment forbids reducing the adult population to reading and viewing only works suitable for children. *Virginia v. American Booksellers Ass'n*, 484 U.S. at 389, 108 S.Ct. at 640-41 (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-74, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983); *Butler v. Michigan*, 352 U.S. 380, 383-84, 77 S.Ct. 524, 525-26, 1 L.Ed.2d 412 (1957)). Even where statutes have not been upheld, however, the Supreme Court has recognized that some limitation on the access of adults to material protected for them but harmful to minors is permissible. *Sable Communications of California, Inc. v. FCC*, ___ U.S. ___, 109 S.Ct. 2829, 2838-39, 106 L.Ed.2d 93 (1989) (invalidating total ban on adult access to indecent telephone messages but intimating that a statute restricting access through certain means would be narrowly tailored and constitutional); *Butler*, 352 U.S. at 383, 77 S.Ct. at 525-26 (invalidating statute banning reading materials inappropriate for children, but implying that a statute "reasonably restricted to the evil with which it is said to deal" would be constitutional).

Several courts evaluating variously defined display regulations such as the instant one have emphasized that the state's legitimate interest in protecting its young must be balanced against the right of adults to have access to protected material. *See, e.g., Upper Midwest Booksellers*, 780 F.2d at 1394-95; *Webb II*, 643 F.Supp. at 1552. On the one hand, a state's interest in protecting children from exposure to material obscene as to minors is a substantial and important state interest. *Ferber*, 458 U.S. at 757, 102 S.Ct. at 3354-55 (1982); *Ginsberg*, 390 U.S. at 639-42, 88 S.Ct. at

1280-82. On the other hand, the indirect burden on adults' First Amendment right to have access to material not obscene for adults must be narrowly drawn. *See Upper Midwest Booksellers*, 780 F.2d at 1396-97 (regulation must leave open adequate alternative channels, must not restrict expression at its source, and must not impose "significant" restrictions on adult access); *M.S. News Co.*, 721 F.2d at 1288 (restriction on adults' access to material that is not obscene as to them must be reasonable); *Rendell*, 332 Pa.Super. at 581, 481 A.2d at 941 ("incidental restrictions on First Amendment freedoms must be limited to those essential to the furtherance of that interest") (citation omitted).

A number of courts have evaluated variously defined restrictions on the display of material "harmful to minors" in light of the constitutional standards for a reasonable time, place, and manner regulation. Display restrictions affect the manner in which speech may be presented or accessed, in contrast to a regulation of pure speech at its source or an outright ban on its accessibility to adults.[15]

We see no relevant distinction in this case between the constitutional standards applicable to a time, place,

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[15] The cases discussed in the text above at pp. 1499-1500 with regard to standards of review for facial overbreadth challenges hold that regulations on display affect only the manner in which speech may be presented. *Upper Midwest Booksellers*, 780 F.2d at 1391-92; *M.S. News Co.*, 721 F.2d at 1289; *Rendell*, 332 Pa.Super. at 581, 481 A.2d at 941.

and manner restriction,[16] and the balancing test described above for a regulation of speech unprotected as to minors

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[16] In order to be upheld as a reasonable time, place, and manner restriction, a statute must (1) not be based on content or subject matter, (2) be narrowly drawn, (3) further a significant governmental interest, and (4) allow for sufficient alternative forms of expression. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Regan v. Time, Inc.*, 468 U.S. 641, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

As the district court acknowledged, "the *Playtime Theatres* Court concluded that a restriction is content-neutral if it is concerned with the 'secondary effects' of the speech at issue . . . , rather than with eradicating a particular type of speech." 643 F.Supp. at 1554 (citations omitted). The "secondary effects" of the regulated speech in *Playtime Theatres* related to the negative impact of adult theaters or "regulated uses" on a neighborhood's environment. The "secondary effects" of materials protected for adults but obscene to minors stem from the impact of in-store access to such materials by minors. The district court found that the defendants presented no evidence of such "secondary effects" from in-store access. The court reasoned that while in *Ginsberg* the Supreme Court required only a rational basis for the legislative conclusion that an unlimited right to purchase and view sexually explicit materials would be harmful to minors, since the right of adults to have access to such material is implicated, unlike in *Ginsberg*, a higher evidentiary standard is required under *Playtime Theatres*.

We agree with the *Upper Midwest Booksellers* court in finding that the empirical data required to sustain intricate commercial zoning regulations is not necessary to sustain the type of legislation at issue in this case. 780 F.2d at 1397 n. 11. As the *Upper Midwest* court observed, "[w]e see no [legally relevant] distinction between finding that exposure by virtue of the

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that indirectly affects speech protected as to adults. In evaluating the display ban under either test, the crucial inquiry, at least in this case, is whether the restriction on adults' access to protected speech is unnecessarily burdensome or "significant," or, stated differently, whether alternate modes of adult access are unduly restricted.

Appellees contend that Georgia's restriction on the display of material "harmful to minors" burdens protected activity in many ways. The district court considered those potential burdens under the general rubric of "overbreadth analysis" – a phrase that courts often use loosely to refer to the propensity of a statute to sweep protected activity into its purview, or unnecessarily to burden protected activity through the collateral effects of its operation on unprotected activity. There are, however, several distinct types of overbreadth alleged in this case, each of which require separate analysis.

IV OVERBREADTH ANALYSIS

A. *Direct Regulation of Protected Activity.*

The type of "legislative overkill" most commonly associated with "overbreadth" results when lawmakers define the scope of a statute to reach both unprotected

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display of proscribed materials is harmful to minors and finding that the sale of proscribed material is harmful." *Id.* A court need only determine that "it was not irrational for the legislature to find that [even fleeting] exposure to material condemned by the statute is harmful to minors." *Ginsberg*, 390 U.S. at 641, 88 S.Ct. at 1281.

expression as well as, at least potentially, protected speech. For example, in *American Booksellers Ass'n v. McAuliffe*, 533 F.Supp. 50 (N.D.Ga.1981), the court struck down as overbroad a Georgia statute banning the distribution to minors of, *inter alia*, a "picture of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex." On its face, the statute covered material that would not be obscene as to minors under the *Ginsberg* standard; thus, it directly regulated material protected even as to minors and was therefore overbroad. *Id.* at 52-53.

The definition of material targeted in Georgia Code section 16-12-102 suffers from no such "legislative overkill"; it employs a narrowly crafted *Ginsberg*-type adaptation of the current definition of adult obscenity announced in *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15, 37 L.Ed.2d 419 (1973). Although the Supreme Court has not decided what effect *Miller* will have on the *Ginsberg* formulation of a variable obscenity standard,[17] we join other courts in finding that the post-*Ginsberg* definition of adult obscenity announced in *Miller* (as modified for determining that which is obscene to minors) does not restrict the scope of materials that a state may regulate. *See American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 n. 2 (4th Cir.1989); *M.S. News Co.*, 721 F.2d at 1286-87. Both the Georgia law at issue in this case and the New York statute approved in *Ginsberg* "adapted the current obscenity test so it could be used to determine whether material is harmful to minors." *id.* at

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[17] *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n. 10, 95 S.Ct. 2268, 2275 n. 10, 45 L.Ed.2d 125 (1974).

1286 n. 4 (comparing the N.Y. statute in *Ginsberg* with a Wichita, Kansas ordinance derived from the *Miller* test). *See American Booksellers Ass'n v. Virginia*, 882 F.2d at 127. Nothing in *Miller* casts any doubt on the constitutional viability of a variable standard of obscenity for minors based upon a *Ginsberg*-like adaptation of the current Supreme Court standard for determining adult obscenity.[18]

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[18] A comparison of (1) the *Ginsberg* standard, (2) the *Miller* standard and (3) the standard articulated in O.C.G.A. § 16-12-102 discloses that *Miller* does not affect the validity of the definition utilized in the Georgia statute, and in general only modifies the third prong of the *Ginsberg* standard for obscenity.

The first prongs of all three tests are essentially the same. *Compare Memoirs v. Massachusetts*, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966) (plurality opinion) *and Ginsberg*, 390 U.S. at 633, 88 S.Ct. at 1276-77 *with Miller*, 413 U.S. at 24, 93 S.Ct. at 2614-15 *and* O.C.G.A. section 16-12-102(1)(A).

The district court suggested that "[t]he *Miller* obscenity test does not incorporate the 'taken as a whole' standard into the second part of the test [articulated in *Memoirs* and *Ginsberg*]." *Webb I*, 590 F.Supp. at 688. The second question in the *Memoirs-Ginsberg* test is whether the material is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." *Ginsberg*, 390 U.S. at 633, 88 S.Ct. at 1276-77. *Cf. Memoirs*, 383 U.S. at 418, 86 S.Ct. at 977 (adult standard). Similarly, the second test for adult obscenity in *Miller* is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller*, 413 U.S. at 24, 93 S.Ct. at 2615. Section 16-12-102(1)(B) retains the *Ginsberg* "as a whole" language for the second prong; therefore, even assuming *arguendo* that *Miller* relaxed the standard, the Georgia definition and those like it are either (1)

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Appellees maintain that section 16-12-102's definition is overly broad because it does not accommodate the

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completely consistent with *Miller*, or (2) narrower than the second prong of the more recent test articulated in *Miller*. A state is entirely free to adopt a test for obscenity that is narrower than current First Amendment jurisprudence requires.

Our reading of the second prong of the test articulated in *Memoirs*, *see* 383 U.S. at 418, 86 S.Ct. at 977, and in *Ginsberg*, *see* 390 U.S. at 633, 88 S.Ct. at 1276-77, satisfies us that the *Memoirs-Ginsberg* test for whether the material is "patently offensive" refers specifically to the objectionable portion of the work in question and does not, indeed, cannot logically, be evaluated on the basis of the work as a whole. That is, whether the sexually explicit portion of the work is "patently offensive," – a necessary condition that is distinct from the other two prongs – does not depend upon or in any way relate to the "work as a whole" or to the unobjectionable portions of the allegedly obscene work. Thus, the absence of the "as a whole" language in the *Miller* test does not work a change in the second prong of the obscenity test.

The apparent confusion stems from the fact that the particular articulation of the second test in the statute at issue in *Ginsberg* asks whether the material was "patently offensive to prevailing standards in the adult community *as a whole*." 390 U.S. at 633, 88 S.Ct. at 1276-77. The plurality opinion in *Memoirs* makes no mention of the "as a whole" requirement. *See* 383 U.S. at 418, 86 S.Ct. at 977. It is our view that the phrase "as a whole" merely modifies "community" and expresses the idea articulated in *Memoirs* and a later case, *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987), that the first and second tests under the pre- and post-*Ginsberg* (i.e., *Miller*) definition of obscenity must be judged with reference to the "average" member of the "whole" community, whereas the third prong is decided with reference to whether a reasonable member of the community would find serious value in the

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differences between older and younger minors in maturity levels and capacity to comprehend literary themes. According to appellees, the use of a single standard for all minors denies older minors access to materials that have serious literary value for them.[19]

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allegedly obscene material, regardless of whether the "average" member of the community or the community "as a whole" would find serious value. *Id.; Hunter v. State,* 257 Ga. 571, 573, 361 S.E.2d 787, 789 (1987). The first and third prongs also require that the allegedly obscene material be viewed "as a whole." *Id.*

The interpretation that the first two prongs of the *Memoirs-Ginsberg* definition of obscenity were not changed by *Miller* in any way material to this appeal is further supported by the fact that the *Miller* Court did not distinguish the first two prongs of its obscenity test from the *Memoirs-Ginsberg* test, yet it explicitly declined to adopt the "utterly without redeeming social value" test articulated in *Memoirs* and used in *Ginsberg.* The Court instead stated that the state need not prove an "utter" lack of value – a "test that called on the prosecution to prove a negative, *i.e.,* . . . a burden virtually impossible to discharge under our criminal standards of proof," 413 U.S. at 22, 93 S.Ct. at 2613, but must instead show that the material, "taken as a whole," lacks serious literary, artistic, political or scientific value." *Id.* at 24, 93 S.Ct. at 2615. In other words, *Miller* relaxed the third prong of the obscenity test and allowed the government to regulate material that satisfies the other two prongs of the test and has little or no value to society. We see no reason why the change in section 16-12-102(1)(C) to reflect the *Miller* standard for serious value should in any way affect the *Ginsberg* holding that the government may prohibit the sale or distribution of material deemed obscene under the current Supreme Court definition of obscenity for adults, as modified to apply to minors.

[19] The district court seemed to reject this argument in its first order: "the Court cannot accept plaintiffs' premise that a

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We disagree, and find that Georgia courts would interpret section 16-12-102 in light of *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). In *Pope*, the Supreme Court construed the test for adult obscenity and held that "[t]he proper inquiry is not whether an ordinary member [of the community] would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." *Id.* at 500-501, 107 S.Ct. at 1921 (footnote omitted). *Hunter v. State*, 257 Ga. at 571-72, 361 S.E.2d at 788 (1987). As interpreted in *Pope*, the first two prongs of the *Miller* test utilize "contemporary community standards," whereas "serious value" is determined not with reference to "majority approval," but on the basis of whether any reasonable person would find serious value – even if the community as a whole, or the "average" member of the community, would not. 481 U.S. at 500, 107 S.Ct. at 1920-21. See the discussion in footnote 18 above. *Pope*

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single standard for all minors necessarily . . . 'restrict[s] older minors to reading or reviewing that which is appropriate for the very young or immature child,' " *Webb I*, 590 F.Supp. at 688-89 (footnote omitted), only to embrace it in its second order. The *Webb II* court interpreted the statute to cover " 'the predominant amount of all of the adult reading material' " because the serious value prong must be applied in light of what "most" minors can comprehend, and would cover any work satisfying the first two prongs of the obscenity test while having serious literary value that a ten-year-old could not appreciate, *Webb II*, 643 F.Supp. at 1550, or that would not be suitable for a fifth-grade reading list, *id.* at 1548.

echoes the fundamental idea that, although "We the People" are sovereign under the Constitution, the Founders added the Bill of Rights as a bulwark against the "tyranny of the majority." If, like the other two prongs of the test for obscenity, we judge "serious value" according to the "degree of local acceptance [the work in question] has won," *id.* at 500, 107 S.Ct. at 1921, then we would compromise the First Amendment's protection against majoritarian pressure to stifle disfavored expression. *See id.* at 500-501, 107 S.Ct. at 1920-21; *id.* at 506, 107 S.Ct. at 1923-24 (Blackmun, J., concurring in part and dissenting in part).

As applied to a *Ginsberg*-type adaptation of the adult obscenity test, *Pope* teaches that if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not "harmful to minors."[20] As the Fourth Circuit and the Virginia Supreme Court recently observed, " 'if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole.' " *American Booksellers Ass'n of Virginia*, 882 F.2d at

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[20] A seventeen-year-old is of course a member of the group to which "prevailing standards in the adult community as a whole with respect to what is suitable material for minors" must be applied under § 16-12-102(1)(C). The addition of a second layer of analysis in a variable obscenity standard, *i.e.*, asking what a reasonable member of the adult community thinks would hold serious literary value for a reasonable minor, does not affect the rule articulated in *Pope*.

127 (quoting *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 372 S.E.2d 618, 624 (1988)).[21]

Section 16-12-102 therefore does not reach materials protected as to minors and is not overly broad in that sense. As we discuss below, this interpretation of the statute's coverage also dramatically decreases the amount of material actually covered by the ban on display and the indirect burden suffered by adults as a result.[22]

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[21] The Supreme Court made no mention of any such overbreadth problem when it upheld the New York statute in *Ginsberg* despite the fact that the "utterly without redeeming social value" prong of the then-current obscenity standard made no explicit provision for the varying levels of maturity and literary comprehension amongst minors. Curiously, appellees do not appeal the ban on the sale or loan of material defined in section 16-12-102 even though the interpretation that the statute covers material that would hold serious value for older minors would raise serious constitutional overbreadth concerns for *both* a display ban *and* a prohibition on sales to older minors. The encroachment on the access of older minors to material which holds serious literary value for them would be just as great if the statute in question banned the sale of such protected material to older minors than if the statute banned its display.

[22] This is not to say that the statute covers only material already subject to Georgia's general obscenity statute, O.C.G.A. § 16-12-80. For example, Defendant's Exhibit 1, *Human Digest* (June 1984), found in a convenience store with no restrictions on in-store access by minors, would be "harmful to minors" and thus subject to section 16-12-103's bans on sales to minors and display. The cover refers to several articles within that are written from the juvenile perspective: " 'Why My Mom Loves Oral Sex!' "; " 'I Made X-Rated Videos for Dad!' "; " 'Sex Slave Sis!' "; and " 'My Anal Aunt!' ".

Even when the state regulates only speech that is unprotected to one group (minors), the restriction can collaterally burden speech that is protected for another group (adults). The regulation can be "overly broad" if it indirectly produces an unnecessary or intolerable restriction on protected speech.

B. *Indirect Regulation of Protected Activity.*

1. Overbreadth from indeterminacy.

The overbreadth and vagueness doctrines are related yet distinct. *M.S. News Co.*, 721 F.2d at 1287.

> "The vagueness doctrine is anchored in the Due Process Clauses of the Fifth and Fourteenth Amendments, and protects against legislation lacking sufficient clarity of purpose and precision in drafting. *See Erznoznik v. City of Jacksonville*, [422 U.S. 205,] at 217-218, 95 S.Ct. [2268,] at 2276-77 [45 L.Ed.2d 125 (1975)]; *Grayned v. City of Rockford*, 408 U.S. 104, 108-14 & n. 5, 92 S.Ct. 2294, 2298-302 & n. 5, 33 L.Ed.2d 222 and n. 5 (1972).

Id. (footnote omitted). The vagueness doctrine focuses on whether the law in question affords a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108-109, 92 S.Ct. at 2298-99. "Overbroad legislation need not be vague, indeed it may be too clear; its constitutional infirmity is that it sweeps protected activity within its proscription." *M.S. News Co.*, 721 F.2d at 1287 (citation omitted).

The overbreadth and vagueness doctrines are related in that "a court should evaluate the ambiguous as well as

the unambiguous scope of the enactment. . . . [since] ambiguous meanings cause citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 6, 102 S.Ct. 1186, 1191 n. 6, 71 L.Ed. 2d 362 (1982) (quoting *Bagget v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964)); (in turn quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)).

Based upon its interpretation that the serious value of a work must be evaluated with reference to that which "most" minors, or even a ten-year-old minor, would appreciate, and that the statute thus applies to a vast amount of adult reading material, the district court found that the statute places an intolerable burden on booksellers to determine which books the display ban would reach. The tremendous volume of material published and the practical inability of booksellers to gain more than a synoptic familiarity with the material they order from publishers would, according to the court, force booksellers to err on the side of caution by "refusing to order [for display] any book with a suggestive cover or the works of an author known for sexually explicit prose." *Webb II*, 643 F.Supp. at 1550.

We believe that the burden on booksellers would be far less than the district court suggests. First, since only a minimal number of works will have serious value for reasonable adults but not for reasonable minors, including older minors, the statute will not increase to any great extent the screening that stores must do in order to comply with Georgia's general obscenity statute, O.C.G.A.

§ 16-12-80.[23] Second, despite the increased opportunity to evaluate the fitness of material at the *point of sale* to minors, as opposed to *ordering* from a publisher for display sales,[24] the display ban will only incrementally increase the screening necessary for booksellers to comply with the prohibition on the sale of "harmful" material to minors, a burden the district found constitutional under *Ginsberg* – a holding that appellees do not appeal. Finally, section 16-12-103(e) only prohibits displays that are made "knowingly."[25] For these reasons, we find that section 16-12-102's definition does not render the display ban substantially overbroad due to indeterminacy.

2. Overbreadth and the burden of mandatory compliance strategies.

If in an ideal world it were possible to make the material defined in section 16-12-102 invisible to minors but completely visible and accessible to adults, we would

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[23] The district court agreed that if "materials can be displayed if they hold literary value for anyone under the age of eighteen," 643 F.Supp. at 1554 n. 17, the burden on booksellers would be substantially decreased. "The court indicates that if the display provision applied only to material on the fringe of protected expression," *id.* at 1554, or only material "inappropriate for minors approaching the age of majority," *id.* at 1556, it would be constitutional.

[24] A bookstore owner testified that it is easier to comply with the sales prohibition since "at the point of sale [the bookseller] has the opportunity to assess the maturity of the purchaser and to review the book selected." *Webb II*, 643 F.Supp. at 1551 n. 9.

[25] See the Appendix to this opinion for the definition of "knowingly" in section 16-12-102(2).

need to inquire no further. As we interpret it, the statute covers only material unprotected to minors and is not so indeterminate that it unduly chills protected expression. Since in the real world material cannot be made "invisible" to minors without hampering to a certain extent adults' access to it, we must analyze the compliance strategy section 16-12-103(e) actually mandates.

The statutory "breadth" that we analyze in this context refers to the degree of practical inconvenience actually required by the language of subsection (e). Only by focusing on that which the statute *requires* for compliance with the display ban, rather than on every compliance strategy that is sufficient but not necessary under the statute, can we determine whether section 16-12-103(e) is "substantially overbroad" or "not narrowly drawn." Since this is a facial challenge, we cannot, as appellees seem to suggest, consider the constitutional propriety of the most onerous methods of compliance which a broad reading of subsection (e) could possibly require. Such an evaluation must await specific enforcement facts and a different interpretation of the law by the Georgia courts.

In order to violate section 16-12-103(e), a person must knowingly "exhibit, expose, or display in public . . . at any . . . public place . . . where minors are or may be invited as part of the general public"[26] a sexually explicit "visual representation" that satisfies the three-pronged test under section 16-12-102, or "printed material" or a "sound recording" that contains a "visual representation"

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[26] We have omitted several of the more specific terms in section 16-12-103(c) that are somewhat redundant given the more general phrases also utilized.

or a sexually explicit narrative account that is obscene as to minors under section 16-12-102.

First, it is beyond cavil that, regardless of the specific method booksellers[27] choose to comply with the statute, they must deny minors unfettered physical access to offensive material. Even if it technically satisfies the prohibition on "display[ing]" such material, any method of compliance by which a person knowingly permits minors an unfettered opportunity to peruse the material would elevate form over substance and violate section 16-12-103(e).

Second, we read "where minors are or may be invited as part of the general public" as limiting the clauses specifying the types of premises upon which display is banned. Thus, if minors are denied access to the premises, booksellers may display such material openly without violating the statute. Indeed, even a separate room or physical structure that is inaccessible to minors could presumably house open displays of the material. But we do not read section 16-12-103(e) as *requiring* such compliance strategies; thus we need not consider whether the burden on adults' access would be overbroad.

The use of the terms "exhibit," "expose," and "display" – especially as modified by "in public" – strongly suggests that the mere *presence* of material "harmful to minors," even in that part of premises frequented by minors, would not violate section 16-12-103(e). One court, construing the word "display" in the context of statutory

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[27] We use the word "booksellers" throughout this passage to refer generically to any person subject to the statute.

language very similar to section 16-12-103,[28] recognized that common dictionary definitions of the term connote an open and ostentatious placement of the material:

> BLACK'S LAW DICTIONARY (5th Ed. 1979) defines a "display" as "an opening or unfolding, exhibition, manifestation, ostentatious show, exhibition for effect, parade." Similarly, WEBSTER's NEW COLLEGIATE DICTIONARY (1976) states that "to display" is to "put or spread before the view publicly," "make evident," "exhibit ostentatiously," or "show off."

Rendell, 332 Pa.Super. at 575, 481 A.2d at 938 (footnote omitted). The *Rendell* court interpreted the ban on "display" as not applying to the open shelving of material "harmful to minors":

> These definitions suggest that the mere shelving or stocking of questionable material, without in some manner directing attention to them, is not the type of conduct prohibited by virtue of the legislature's use of the term "display."

Id. at 575-76, 481 A.2d at 938-39.

While we agree that the terms "exhibit," "expose," and "display" connote an open and ostentatious placement of the materials, we cannot agree that the Georgia legislature sanctioned in section 16-12-103(e) the open shelving of material "harmful to minors." The use of the

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[28] The statute at issue in *Rendell*, 18 Pa.Cons.Stat. § 5903(a)(1), prohibited, in relevant part, the "display [of material obscene as to minors under a three-prong test similar to O.C.G.A. § 16-12-102] . . . in any business or commercial establishment where minors . . . are or probably will be exposed to view all or any part of such materials." *See* 332 Pa.Super, at 566, 481 A.2d at 934.

term "expose" suggests that even unadvertised and passive placement of the material entirely in open sight would violate section 16-12-103(e).[29]

Appellants have suggested a number of compliance strategies that they claim would satisfy section 16-12-103(e). They assert that openly displaying material "harmful to minors" in an area "supervised by the clerks in order to keep them out of the hands of minors," Appellants' Brief at 44, or in "adults[-]only racks or sections,"[30] *id.* at 41, would be acceptable. We disagree.

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[29] The Colorado Supreme Court struck down a display ban with identical language as section 16-12-103(e) in *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo.1985) (construing Colo.Rev.Stat. § 18-7-502(b)(5) (1984 Supp.)). However, in *Tattered Cover, Inc.* the parties stipulated that there were only five ways to comply with the statute:

> (1) prohibiting entry into the plaintiffs' stores of persons under the age of eighteen; (2) refusing to carry or display all sexually explicit material; (3) refusing to carry or display material proscribed by the Act; (4) restricting access to substantial portions of their material by segregating sections of their establishment with an "adults only" section; and (5) establishing an "adults only" section solely for material proscribed by the Act.

Id. at 783. The Colorado Supreme Court found the statute unconstitutional explicitly on the basis of the trial court's factual finding that the stipulated compliance strategies were not commercially feasible. The parties in this case, by contrast, have not stipulated that these are the only ways in which section 16-12-103(e) may be satisfied. We construe section 16-12-103(e) as affording several less burdensome compliance options.

[30] We interpret "adults[-]only sections" to refer to aisles or open places in a store not physically separate from areas

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Although these methods would prevent actual physical access and perusal by minors – a fundamental aim of the statute – section 16-12-103(e) is not "readily susceptible" to an interpretation allowing such a compliance strategy. Unlike the Virginia statute which the Fourth Circuit recently upheld, section 16-12-103(e) does not contain language that narrows the common usage of the word "display".[31] Placing the material entirely in open sight in an establishment "where minors are or may be invited as part of the general public" would violate section 16-12-103(e) despite a "nonperusal" policy or signs indicating that certain otherwise open areas are off-limits to minors.

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accessible to minors. As we understand their use of this phrase, appellants suggest that material "harmful to minors" could be displayed openly if the store had in place adequate signs and/or a surveillance policy insuring that the adults-only area and its contents were not accessible to minors. Such a "section" or "aisle" is distinct from a physically segregated room or area inaccessible to minors.

[31] Va.Code Ann. § 18.2-391(a) (1989) makes it unlawful "to knowingly display [material deemed "harmful to minors"] *in a manner whereby juveniles may examine or peruse [it].*" (Emphasis added.) *See American Booksellers Ass'n v. Virginia*, 882 F.2d at 126-27. In answer to a question certified by the United States Supreme Court in an appeal of the Fourth Circuit's earlier decision that the statute was unconstitutional, *see* 484 U.S. 383, 108 S.Ct. 636, the Virginia Supreme Court found that the statute would be satisfied by a store policy of prohibiting the perusal of such material by minors whenever observed. *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 372 S.E.2d 618 (1988).

Appellants also suggest that the statute is satisfied by placing material "harmful to minors" behind devices commonly referred to as "blinder racks" or shelves which cover at least the lower two-thirds of material that would otherwise be exposed to view. *Id.* at 41-43. *See M.S. News*, 721 F.2d at 1287 (briefly describing "blinder racks"). We agree. Simply put, blinder racks do not "exhibit, expose, or display in public" material subject to section 16-12-103(e); they eliminate the ostentatious and open placement of the material.[32] Therefore, under our reading of section 16-12-103(e), it is not necessary that booksellers physically segregate material placed behind blinder racks from material accessible to minors. Since the statute is "readily susceptible" to such a reading, we need not consider broader interpretations of the requirements for compliance with section 16-12-103(e). *Virginia v. American Booksellers Ass'n*, 484 U.S. at 397-99, 108 S.Ct. at 645 (1988).[33] Placing the relatively small amount of reading

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[32] As we stated in the text above, regardless of the method chosen to comply with the statute, minors must be denied the opportunity to peruse the material subject to section 16-12-103(e). The ban on "display" would be but a pyrrhic victory for the legislature and would not serve the purpose of protecting minors if they were allowed simply to reach over the blinder rack and remove the material for unfettered perusal. We need not specify the steps that must be taken to assure that the opportunity to browse is eliminated. Since any violation of section 16-12-103 must be done "knowingly," we are confident that a number of options are available that would eliminate the perusal by minors of material placed behind blinder racks without hindering adults' access to such material.

[33] We recognize that it is possible to read section 16-12-103(e) to require more than the use of blinder racks. It

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material subject to section 16-12-103 behind blinder racks only slightly burdens adults' access to such material. Blinder racks do not impose a "substantially overbroad" regulation on "conduct plus speech." (See the discussion above at pp. 1499-1500, 1502.) Adults may peruse and purchase the material without restriction. Under either the balancing test for regulations on material protected to one group but not another, or the test for the constitutionality of a time, place, and manner regulation, (see the

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was suggested at oral argument that in order to satisfy section 16-12-103(e) in an establishment open to minors, material "harmful to minors" must be (1) placed behind or underneath the counter, or in some other area not visible to the general public but available to adults upon request; (2) sealed in plastic and/or fitted with an opaque cover, depending on whether its cover or contents, or both, were subject to the ban, *see* § 16-12-103(e)(1) and (e)(2); or (3) placed in a physically separate room or area from that portion of the establishment open to minors. We make no determination as to whether these suggestions would satisfy the statute.

Given the district court's factual finding that sales of reading material depend heavily on its "display" and availability for perusal by adults, and that requiring adults to request material kept underneath the counter can inhibit choice, these compliance strategies in general seem to impose more burden on adults' access to material protected as to them. We need not determine whether such burdens would be constitutionally permissible, however, since in a facial challenge the possibility that the Georgia courts could conceivably interpret section 16-12-103(e) more broadly than we do is insufficient to render it invalid. *Virginia v. American Booksellers Ass'n*, 484 U.S. at 397-99, 108 S.Ct. at 645; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

discussion above at p. 1502), the burden on adults' access to material protected as to them is constitutionally insignificant and therefore permissible. *See M.S. News*, 721 F.2d at 1288-89 (relying in part on blinder racks exception to uphold statute against facial challenge).

V. EQUAL PROTECTION AND THE LIBRARY EXEMPTION

Section 16-12-104 exempts "any public library operated by the state or any of its political subdivisions[, or] any library operated as a part of any school, college, or university," from each of the restrictions in section 16-12-103 on the distribution, exhibition, or display of materials "harmful to minors." Thus, while it would be unlawful for any person to "sell or loan" to a minor material deemed obscene as to minors under section 16-12-102, or to exhibit to a minor a motion picture satisfying the three-pronged test, it would be permissible for a public library to do so. Similarly, while it would be lawful for a library to display material that is "harmful to minors," a person would be subject to criminal penalties for knowingly undertaking the same activity on the premises of, for example, a convenience store open to minors.

The district court correctly determined that "[t]he critical step in Equal Protection analysis is determining the proper standard of review." *Webb II*, 643 F.Supp. at 1555. We disagree, however, with the district court's determination that the legislature's classification in this case is subject to strict scrutiny.

Several courts have addressed this question and have differed on whether strict scrutiny is appropriate. Without elaborating, the district court adopted the approach followed in *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 602 F.Supp. 1361, 1374 (D.Minn. 1985), *aff'd*, 780 F.2d 1389, 1398 (8th Cir.1985) (exemption from regulation on manner of display). In that case, the Eighth Circuit affirmed a district court's determination that "the strict scrutiny test is the proper standard whenever government classifies individuals' ability to exercise a fundamental right such as speech." 602 F.Supp. at 1374. Our research indicates that only the Colorado Supreme Court, in *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 786 (Colo.1985), has agreed that strict scrutiny applies to a classification involving materials deemed "harmful to minors."[34]

The Tenth Circuit held in *M.S. News* that the rational basis test applies to a "classification that distinguishes between commercial and noncommercial enterprises" in a regulation requiring the former group but not the latter to place behind blinder racks material obscene as to

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[34] In *Kucharek v. Hanaway*, 714 F.Supp. 1499, 1517 (E.D.Wis.1989), a district court struck down Wisconsin's adult obscenity law on vagueness grounds but upheld a library exemption under the rational basis test. The court acknowledged in passing dicta that strict scrutiny might be appropriate for evaluating classifications involving material that is obscene for children but not adults. The Seventh Circuit recently reversed the vagueness holding and affirmed the library exemption without discussing this dicta. *Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir.1990).

minors.[35] 721 F.2d at 1291-92. The Ninth Circuit has recently approved of this approach:

> We agree with the Tenth Circuit's approach in *Casado*. The Supreme Court has held that obscene speech is not protected by the first amendment. *See Miller v. California*,. . . . A valid

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[35] Although the *M.S. News* court referred to the exemption in that case as generally turning on the commercial/noncommercial distinction, the Wichita ordinance at issue did not refer explicitly to "commercial" use; instead, it provided an affirmative defense if the material or performance was "displayed, presented or disseminated to a minor at a recognized and established school, church, museum, medical clinic, hospital, public library, governmental agency, quasi-governmental agency and [if done] for a bona fide governmental, educational or scientific purpose." Code of the City of Wichita § 5.68.156(3) (1979). *See M.S. News*, 721 F.2d at 1291.

Appellees make much of the fact that section 16-12-104 does not turn specifically on whether the material is distributed, exhibited, or displayed commercially rather than noncommercially. Appellees' Brief at 44-45. *See also Webb II*, 643 F.Supp. at 1556 n. 20 (noting "that the legislature apparently rejected the commercial/noncommercial distinction in amending the Act"). Appellants respond that "[e]ven though the Georgia Act does not on its face exempt as many non-commercial distributions or displays as did the Wichita ordinance [in *M.S. News*], it is clear that the exempted conduct under the Georgia law is in fact non-commercial." Appellants' Brief at 55. Outside of "suspect classification" Equal Protection analysis, the specific facts upon which the legislature's classification turns do not shed light on the "fundamentalness" of the right affected by the classification; therefore those facts do not influence the level of scrutiny that a court must apply. Rather, the facts upon which the classification turns help explain both its legislative purpose and the likelihood that the classification will serve this purpose.

> obscenity statute that follows the three-part definition of obscenity set out in *Miller* does not punish the exercise of a fundamental right. There is no fundamental right to engage in obscene speech. Strict scrutiny is thus not appropriate.
>
> The Supreme Court cases applying strict scrutiny to classifications in statutes regulating speech are easily distinguished. Th[e statutes challenged in those cases] all regulated or prohibited *protected* speech, rather than obscenity.

Ripplinger v. Collins, 868 F.2d 1043, 1050 (9th Cir.1989) (also criticizing the *Upper Midwest Booksellers* and *Webb II* approach) (citation omitted). *See also Rendell*, 332 Pa.Super. at 583, 481 A.2d at 942; *Long v. 130 Market St. Gift & Novelty of Johnstown*, 294 Pa.Super. 383, 395, 440 A.2d 517, 523 (1982).[36]

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[36] The application of the strict scrutiny standard in cases involving classifications drawn in laws regulating material that is not obscene as to either adults *or* minors does not conflict with our holding in this case. In a case relied upon by the *Upper Midwest* court, for example, *Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1049 (2d Cir.1975), the Second Circuit applied strict scrutiny to an ordinance prohibiting topless dancing in bars, restaurants and various other establishments, but allowing such dancing in opera houses, theaters and other places. *See id.* at 1046-47 (describing the classification). The *Salem Inn* court explicitly pointed out that its decision to apply strict scrutiny turned on the fact that on its face the ordinance reached displays "of the partially nude female form" that were not obscene as to even minors and thus constituted completely protected expression:

> We reemphasize that the ordinance here is directed not at lewdness or obscenity but at nudity which, the

(Continued on following page)

The constitutional protection accorded to the right which the legislature classifies – and thus judicial scrutiny of the classification – should depend not on broad propositions such as "free speech is fundamental," or "obscenity is unprotected," but, rather, on the specific nature of the conduct that the legislature has decreed one group may engage in, while a separate class may not. By looking precisely at the conduct implicated by the exemptions to each of the provisions in the Georgia statute, we see that the classification on the right to sell or loan material to minors that is obscene as to them is somewhat

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> [Supreme] Court has reminded us, is not per se 'obscene even as to minors.'

Id. at 1049 (citation omitted). *See also Cruz v. Ferre*, 571 F.Supp. 125, 134 (S.D.Fla.1983) (strict scrutiny applied to classification drawn between broadcast and cable television in regulation reaching indecent but not obscene material), *aff'd*, 755 F.2d 1415 (11th Cir.1985).

The *Ripplinger* court agreed with the rational basis test approach in *Casado*, but placed *Tattered Cover*, *Upper Midwest* and *Webb II* within the category of cases including *Salem Inn* and *Cruz*, rather than *Casado* – although it acknowledged that "[n]either [*Upper Midwest* nor *Webb II*] is written so narrowly." *Ripplinger*, 868 F.2d at 1050 n. 7. We do not agree that the Minneapolis ordinance and the Colorado and Georgia statutes dealt with regulations on " 'sexually explicit' material rather than 'obscenity' as defined in *Miller v. California*." *Id.* The regulations in all three cases regulated not merely "sexually explicit" material, but material that is at least obscene as to minors. *See Upper Midwest*, 780 F.2d at 1390-91; *Webb II*, 643 F.Supp. at 1549-50; *Tattered Cover, Inc.*, 696 P.2d at 787.

distinct from the right to display such material to adults without regulation.[37]

A. *A Classification on the Right to Sell or Loan Obscene Materials to Minors.*

The *Ginsberg* Court held without equivocation that the Constitution does not protect the decision to sell or loan to minors material that is obscene under a variable obscenity standard. If the state has a rational basis for concluding that a legitimate interest will be served by the classification, it may create distinctions between the rights of persons and entities to engage in conduct not protected by the Constitution. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29, 93 S.Ct. 1278, 1294-95, 36 L.Ed.2d 16 (1973).

The state clearly has an interest in making such material available to minors, if at all, only in an environment free of the commercial pressure to pander to a minor's prurient interest in sex. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57, 93 S.Ct. 2628, 2635, 37 L.Ed.2d 446 (1973); *Young v. American Mini Theatres*, 427 U.S. 50, 69, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976) (plurality). Although the exclusion under the *Miller* test (as adapted in light of

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[37] The right to sell an admission ticket to a minor for a motion picture or other presentation that is obscene as to minors under section 16-12-102 is, for the purposes of this discussion, virtually the same as selling or loaning to minors material that is obscene as to them. Thus, the exemption to section 16-12-103(b) implicates the same equal protection analysis as the exemption to section 16-12-103(a), which is discussed in the text.

Ginsberg, *see* section 16-12-102(1)(C)) for material with "serious literary, artistic, political, or scientific value to minors" will already exempt most sexually explicit material that one would expect to find in a public library, the library exemption preserves the accessibility of such material to minors for purely educational purposes.[38]

The fact that the state has chosen not to exempt all noncommercial entities, or even specific noncommercial entities that could be expected to promote the same interests as libraries, is of no consequence so long as the particular exemption chosen has, as in this case, a rational basis. If the classification itself is not based upon a suspect distinction such as race,[39] the Equal Protection Clause is not offended by an under-inclusive or over-inclusive restriction on one's ability to engage in conduct that is not protected by the Constitution. *United States v. Thornton*, 901 F.2d 738 (9th Cir.1990). Finally, striking down such an exemption would hinder rather than promote robust speech.

B. *A Classification on the Right to Display Material Obscene as to Minors.*

Although the classification between libraries and nonlibraries presents a closer question when applied to

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[38] The Seventh Circuit has suggested that library exemptions in obscenity statutes also serve the purpose of shielding libraries from groundless complaints that they are disseminating obscene materials. *Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir.1990).

[39] Appellees have not argued that the classification is itself "inherently suspect" and therefore deserving of strict scrutiny under another branch of Equal Protection analysis.

the ban on the display of materials obscene as to minors, we find that strict scrutiny is not warranted. First, we note that while the Constitution does not protect the distribution to minors of material obscene as to them, creators, publishers, and sellers of such material, as well as adults, are protected from significant or overbroad restrictions on adults' access to materials not obscene as to adults. Nevertheless, as we discussed above, this protection is not absolute. Since the state may make such material unavailable to one segment of society – minors – due to its offensiveness and lack of "serious value" for them, it may also impose a necessary and moderate amount of burden on the group for whom such material is protected – adults – in an effort to protect young adolescents. Simply put, the Constitution does not protect unfettered, open placement of such materials in public places accessible to minors.

Even though the First Amendment is unoffended by a requirement that erotic material not obscene to adults be placed behind blinder racks, we must consider whether, given the unique nature of the right involved, a state may allow one group of entities – libraries – to operate free of this restriction, while all other entities must adhere to the ban on display.

First, we note that the plurality in *American Mini Theatres* found that even a content-based classification of erotic but not obscene material did not violate the Equal Protection Clause since what was ultimately at stake was not the material's total suppression, but only the place where it could be exhibited. 427 U.S. at 71-72, 96 S.Ct. at 2452-53.[40]

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[40] The *American Mini Theatres* plurality upheld a zoning requirement that prohibited more than one adult theater within

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> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . . Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

Id. at 70-71, 96 S.Ct. at 2452.

The classification drawn between libraries and non-libraries in section 16-12-104 is even less deserving of strict scrutiny since, unlike the zoning ordinance in *American Mini Theatres,* it turns not on the content of the

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(Continued from previous page)

1000 feet of any two other "regulated uses." *See* 427 U.S. at 53 n. 3, 96 S.Ct. at 2444 n. 3 (defining "regulated uses"). Only theaters licensed to present material "characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' . . . (as defined [elsewhere in the zoning ordinance])" were subject to the "1000 feet rule." *Id.* at 53, 96 S.Ct. at 2444. Other theaters, like the libraries specified in section 16-12-104 of the Georgia statute, were unrestrained.

material presented – the exemption *and* the ban on display operate only on material obscene as to minors – but on the characteristics of the entity displaying the material – the *medium* of expression. *See Ripplinger*, 868 F.2d at 1051.

The exemption for display of materials harmful to minors at libraries serves the same interests as the exemption for distribution and is rationally related to making material covered by the Act available in an atmosphere free of commercial pressure and generally available for educational purposes. As stated above, the under- or over-inclusiveness of the classification does not offend the Equal Protection clause so long as the classification is rationally related to the state's interest.[41]

CONCLUSION

The judgment of the district court is REVERSED.

POINTER, Chief District Judge, concurring in part and dissenting in part:

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[41] The focus of classification between exempt and nonexempt entities must of course relate to a state's interest in protecting minors from the harmful effects of material that is obscene as to them. A state could not draw a classification affecting speech protected to one group but not another to serve an interest unrelated to protecting the group for which the expression is unprotected. For example, the state could not draw a classification on the right to somehow deal in such material in an effort to address the effect of such quasi-protected speech on neighborhoods, *see American Mini Theatres*, or some such other secondary effect of the speech *unrelated* to the state's interest in protecting the group for whom such material is unprotected – in this case, minors.

I agree with most of the majority's opinion, and specifically concur in the decision that the library exemption provided by section 16-12-104 is constitutional.

I respectfully dissent, however, from the decision upholding the display proscriptions of section 16-12-103(e). In Part IV-B-2 of the opinion, the majority conclude that section 16-12-103(e) can be read to permit booksellers to avoid criminal penalties by using "blinder racks." If I agreed on this point, I would agree with their decision as to the constitutionality of the section. Although on this appeal we should assume that Georgia would adopt a narrow construction of the section, any such narrowing construction would have to be a reasonable one in the light of the words of the statute. I do not believe that the statute adopted by the Georgia legislature is "readily susceptible" to the interpretation approved by the majority.

Section 16-12-103(e) makes it unlawful to "display in public at . . . any . . . business or commercial establishment or at any other public place . . . where minors are or may be invited as part of the general public . . . any . . . printed matter . . . which *contains* any . . . explicit and detailed verbal descriptions . . . of sexual conduct . . . and which, taken as a whole, is harmful to minors." (*emphasis added*) The statute does more than prohibit the display of the materials that are harmful to minors; it prohibits the display of printed matter that "contains" such harmful materials. It makes criminal the display of a magazine with an innocuous cover if harmful materials are to be found inside the cover – and this is so whether

or not any minor is permitted to view the harmful materials themselves. The proscription would likewise apply if a portion of the cover were shielded by "blinder racks."

The only case mentioned in the opinion when discussing this question is *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). *M.S. News* does support the proposition that permitting materials to be displayed behind blinder racks would save the statute from attack; it does not, however, provide any support for concluding that the Georgia statute contains any such exception. The city ordinance at issue in that case prohibited the display of harmful materials (not of publications containing such materials) and contained an express exception for displays in blinder racks.

I suggest that the majority, under the rubric of interpreting or construing the statute, have simply rewritten it.

APPENDIX 7

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8199

AMERICAN BOOKSELLERS, et al.,

Plaintiffs-Appellees,

versus

JAMES WEBB, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion December 27, 1990, 11th Cir., 19___, ___ F.2d ___).

Before: KRAVITCH, Circuit Judge, HILL, Senior Circuit Judge*, and POINTER, Chief District Judge**.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Sam C. Pointer, Jr., Chief U.S. District Judge for the Northern District of Alabama, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

* * *

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

Supreme Court, U.S.
FILED
APR 29 1991
OFFICE OF THE CLERK

(2)

No. 90-1523

In The

Supreme Court of the United States

October Term, 1990

AMERICAN BOOKSELLERS ASSOCIATION, INC.,

Petitioners,

v.

JAMES WEBB, etc. et al.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that the provision of the Georgia minors' access law, which has never been enforced or construed by the Georgia courts, that prohibits the "knowing[]" display in public of material obscene for minors and having no serious value for any reasonable minor does not have a substantial deterrent effect on protected expression, is subject to narrowing constructions, and is therefore not subject to facial overbreadth invalidation.

2. Whether the Court of Appeals erred in concluding that the library exemption of the Georgia minors' access obscenity law, which has never been enforced or construed by the Georgia courts, is not violative of the Equal Protection Clause of the Fourteenth Amendment.

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STATEMENT OF THE CASE

The Georgia minors' access law, which is found at 1984 Georgia Laws 1495, Ga. Code Ann. §§ 16-12-102, *et seq.* ("the Act"), became effective on July 1, 1984. The Act is a modest attempt to in some way restrict the exposure to minors of materials harmful to them. An example of such materials is Defendants' Exhibit 1, which was described by the Eleventh Circuit as follows:

> Defendant's Exhibit 1, *Human Digest* (June 1984), found in a convenience store with no restriction on in-store access by minors, would be "harmful to minors" and thus subject to section 16-12-103's ban on sales to minors and display. The cover refers to several articles within that are written from the juvenile perspective: " 'Why My Mom Loves Oral Sex!' "; " 'I Made X-Rated Videos for Dad!' "; " 'Sex Slave Sis!' "; and " 'My Anal Aunt!' ".

919 F.2d at 1505 n.22.

A number of municipalities and almost all states have minors' access laws.[1] American Booksellers

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[1] *See* Amici Curiae Brief of the State of Georgia, et al., Appendix, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), which cites statutes of 48 states regulating the display or exhibition of materials harmful to minors. In their brief, Georgia and 19 other states urged the Court to note probable jurisdiction of a Fourth Circuit decision striking the Virginia minors' access statute. *American Booksellers Ass'n v. Virginia*, 792 F.2d 1261 (4th Cir. 1986), *vacated* 488 U.S. 905 (1988). Inasmuch as the Fourth Circuit has now reversed itself, *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989), and all other recent circuit decisions have upheld minors' access laws, there is no present reason for Supreme Court intervention.

Association and its kindred plaintiffs have for several years doggedly pursued an unsuccessful national campaign against such laws. *See, e.g., American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989) (upholding Virginia minors' access statute); *American Booksellers Ass'n v. Rendell*, 481 A.2d 919 (Pa. Super. 1984) (upholding Pennsylvania minors' access statute). Attacks by other plaintiffs on minors' access laws have also been largely unsuccessful. *See, e.g., Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) (upholding Minneapolis minors' access ordinance); *M.S. News v. Casado*, 721 F.2d 1281 (10th Cir. 1983) (upholding Wichita minors' access ordinance).

Unlike plaintiffs' statement in their petition, they did not at the trial of this action present "extensive uncontradicted" or "substantial evidence to support their constitutional challenges." (Petition at 9, 12). Nor are plaintiffs correct in saying that defendants "presented no evidence in the trial court controverting the material evidence submitted by plaintiffs." (*Id.*) Plaintiffs' witnesses offered no support to their case. For example, Norma Klein and Patrick Conroy testified that, even based on their flawed understanding that the Act permitted regulation on the basis of isolated excerpts, they did not believe their works to be subject to the Act. (R. IV at 113-14, 153, 155). Moreover, Bobbie West Alford, who showed no understanding of the Act, testified that she did not believe that the work about which she expressed concern, "Cat on a Hot Tin Roof," would be subject to regulation. (*Id.* at 97-98). Instead of supporting plaintiffs' position, the testimony of these witnesses actually shows that the Act would not have any effect on speech materials.

At trial, defendants submitted evidence showing that the Act places a very small burden on affected establishments. Rayford Collins, a Fulton County, Georgia, law enforcement officer, testified that the sample of plaintiffs' establishments he visited before the effective date of the Act were already in compliance. (R. V at 19-30). Janice Horton, a Georgia State Senator, testified regarding a display of sexually explicit materials at a convenience store in McDonough, Georgia. She testified that Defendants' Exhibit 1, which is mentioned above, along with two other sexually explicit exhibits (Defendants' Exhibits 2 and 3) were openly displayed with no restrictive signs and within reach of children. (R. IV at 75-76).

Plaintiffs have in their petition described the journey of this case through the lower federal courts and Georgia Supreme Court. After a period of abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the district court declared the display provision and library exemption of the Act unconstitutional. *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986).[2] As summarized by the Eleventh Circuit, the

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[2] During abstention, the Georgia Supreme Court resolved adversely to plaintiffs a state constitutional issue they had raised. 254 Ga. 399 (responding to certified questions). The Georgia court also declined an open-ended request "to construe the provisions in Act 1319, 1984 Ga. Laws 1495, which have been challenged in this suit." *Id.* at 401. Due to the anticipatory nature of the challenge and the absence of enforcement facts, the court found "it to be inappropriate to establish the parameters within which the Act may or may not be operative." *Id.* Plaintiffs' repeated misrepresentations to this Court that the Georgia Supreme Court refused to construe the statute narrowly ill serve their credibility. (Petition at 8, 13).

district court "interpreted the statute to 'reduce an adult's selection of reading materials to a book list suitable for a fifth grade class.' " 919 F.2d at 1495. The district court concluded that this drastic and unacceptable effect would occur because: the Act covers " 'the predominate amount of all of the adult reading material' "; the application of the "harmful to minors" provision is determined by the maturity of "most minors" including those 10 years old; in order to comply with the Act a bookseller would be required to perform the impossible task of reviewing "his entire inventory"; and there are no readily available narrowing constructions. 643 F. Supp. at 1549-55. Presaging future developments, the district court conceded, however, that if the Act applied "only to material on the fringe of protected expression," *id.* at 1554, or "to materials inappropriate for minors approaching the age of majority," it might well be constitutional. *Id.* at 1556. *See also* 919 F.2d at 1498 (noting district court's concessions). In a later order, the district court found the library exemption not to be severable and struck the entire statute. *American Booksellers Ass'n v. Webb*, 654 F. Supp. 503 (N.D. Ga. 1987).

On December 27, 1990, the Court of Appeals for the Eleventh Circuit reversed the judgment of the district court. Exercising independent appellate review,[3] the court held that under *Pope v. Illinois*, 481 U.S. 497 (1987), a decision unavailable to the district court and which probably would have altered the district court's conclusions, there was a "dramatic[] decrease[] [in] the amount of

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[3] The parties agreed that the Eleventh Circuit should use independent appellate review. 919 F.2d at 1498, 1498 n.10.

material actually covered by the ban on display and [in] the indirect burden suffered by adults as a result." 919 F.2d at 1505. Moreover, the court of appeals concluded that readily available narrowing constructions further reduced any burden on adult speech. 919 F.2d at 1508-09. The Eleventh Circuit also disagreed with the district court's conclusion that the Act's exemption of public libraries is subject to strict scrutiny and therefore violative of the Equal Protection Clause. The court of appeals summarized all of its holdings:

> We find the statute is readily susceptible to a narrowing construction that reduces the scope of materials covered, produces only a slight burden on adults' access to protected material, and fully comports with the First Amendment. We also reverse the district court's determination that an exemption granted in the statute to libraries is subject to strict scrutiny and violates the Equal Protection Clause.

919 F.2d at 1495.

SUMMARY OF ARGUMENT

This case presents a facial attack on the constitutionality of the Georgia minors' access obscenity statute. Plaintiffs have challenged the statute prior to its construction or enforcement by Georgia courts. The statute is designed to discourage premature exposure of minors to materials harmful to them.

This statute is supported by two strong state interests. First, the states have a " 'compelling' " interest in " 'safeguarding the physical and psychological well-being

of a minor.' " *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (cit. omitted). Second, the states have a substantial interest in protecting the rights of parents to supervise the development of their children. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). These state interests support laws limiting not just the sale but also the display to minors of material harmful to them.

Facial overbreadth challenges are disfavored. The successful maintenance of such a challenge requires demonstration that: (1) the statute "is not readily subject to a narrowing construction by the state courts," and (2) the statute's "deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

The Eleventh Circuit correctly held that plaintiffs failed to meet the test for facial overbreadth invalidation. As other circuits and lower courts have held in review of similar laws, the court of appeals held that the Act places only a "slight burden on adults' access to protected material." 919 F.2d at 1495. The court reached this conclusion by applying *Pope v. Illinois*, 481 U.S. 497 (1987), which was not available to the district court, to the *Ginsberg*-derived definition of "harmful to minors." The court recognized that *Pope* does not permit regulation of material as long as "any reasonable minor, including a seventeen-year-old, would find serious value." 919 F.2d at 1504-05. The Eleventh Circuit also held that the scienter requirement, which punishes only "knowing[]" displays, and the ready availability of a construction permitting compliance by use of "blinder racks" "dramatically decreases the

amount of material actually covered by the ban on display and the indirect burden suffered by adults as a result." 919 F.2d at 1506.

The Eleventh Circuit also correctly upheld the library exemption against plaintiffs' equal protection attack. Consistently with other circuits, the court of appeals employed the rational basis test. 919 F.2d at 1509-10. The court correctly recognized that the exemption to this obscenity statute for libraries is rationally related to the states' legitimate interest in controlling the commercial distribution and display of obscene materials and the states' legitimate interest in protecting educational uses of explicit materials. 919 F.2d at 1511-13.

Therefore, the decision of the Eleventh Circuit is correct and plaintiffs' petition should be denied.

ARGUMENT

I. THE GEORGIA ACT IS SUPPORTED BY THE STATES' STRONG INTERESTS IN PROTECTING MINORS FROM ACCESS TO MATERIALS HARMFUL TO THEM AND IN PROTECTING THE RIGHTS OF PARENTS TO SUPERVISE THE DEVELOPMENT OF THEIR CHILDREN.

Minors' access laws are supported by two weighty state interests. First is the compelling state interest in protecting minors from obscene materials. Second, the states have a substantial interest in protecting the rights of parents to supervise the development of their children.

This Court has repeatedly affirmed that states have a strong interest in protecting the welfare of minors. In *New*

York v. Ferber, 458 U.S. 747 (1982), the Court concluded: "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is *'compelling.'* " *Id.* at 756-57 (cit. omitted) (emphasis added). In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court acknowledged " 'society's *transcendent* interest in protecting the welfare of children.' " 390 U.S. at 640 (cit. omitted) (emphasis added). The Court made it clear that this interest is "independent" from parents' interests in their children. *Id.* at 639-40.

In addition to the states' compelling interest in the welfare of minors, states have a substantial interest in protecting the rights of parents to supervise the development of their children. In *Ginsberg*, the Court recognized that parents' right "to direct the rearing of their children is basic in the structure of our society." 390 U.S. at 639. The Court went on to hold that the minors' access law in question there was supported by this interest. *Id. See also Bolger v. Youngs Drug Products*, 463 U.S. 60, 73 (1983) (describing the governmental interest in "aiding parents' efforts to discuss birth control with their children" as *"substantial"*) (emphasis added).

In *Ginsberg*, the Court affirmed a conviction under a New York statute for the sale to a 16-year-old boy of two " 'girlie' " magazines which were "harmful to minors" as defined by the statute. 390 U.S. at 631-33. This result was reached even though the magazines were "not obscene for adults." *Id.* at 634. The Court distinguished the New York statute in question there from the Michigan statute struck down in *Butler v. Michigan*, 352 U.S. 380 (1957), which forbade the distribution to adults of materials

believed to have an adverse effect on minors. 390 U.S. at 634-35.

The states' interests in the protection of minors from sexually explicit materials and preserving the rights of parents as recognized and upheld in *Ginsberg* extend beyond the sale to minors of objectionable materials and include the display of such material in public places. The Court characterized the New York statute, which it upheld, as denying minors *"access"* to harmful material, 390 U.S. at 636 (emphasis added), restricting their right "to judge and determine for themselves what sex material they may read and see," *id.* at 636-37, a regulation of "the *availability* of sex material to minors," *id.* at 639 (emphasis added), and a restraint on "minors' *exposure* to such material." *Id.* (emphasis added). *See also id.* at 641.

Since *Ginsberg*, the Court has repeated the view that the states' legitimate interests extend to all exposure to minors of materials obscene for them. In *FCC v. Pacific Foundation*, 438 U.S. 726 (1978) (plurality opinion), the Court summarized *Ginsberg* as holding that "[b]ookstores and motion picture theatres, for example, may be prohibited from making indecent material *available* to children." *Id.* at 749 (emphasis added). *See also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 (1968) ("because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their *access* to, material objectionable as to them") (emphasis added); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975); *Miller v. California*, 413 U.S. 15, 18-19 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1957).

It is thus clear that the states' legitimate interests in protecting minors from harmful materials extend to all means of public access including display. Obviously, the Georgia Act would not fully express these interests if it forbade only the sale to minors of harmful materials but allowed other forms of dissemination such as display.

II. THIS COURT HAS IMPOSED STRICT LIMITATIONS ON THE FACIAL INVALIDATION OF STATE STATUTES FOR OVERBREADTH.

An overbroad statute is one that sweeps protected First Amendment activity into its scope. This Court has often made clear that the normal procedure for handling a threat by a state or federal statute to constitutionally protected activity is invalidation of the particular application – not striking the statute on its face. For example, in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court reversed a conviction under the Georgia adult obscenity statute for exhibiting the movie "Carnal Knowledge," but did not facially invalidate the statute. *See also Brockett v. Spokane Arcades*, 472 U.S. 491, 502-05 (1985) (citing cases); *Broadrick v. Oklahoma*, 413 U.S. 601, 613-14 (1973) (citing cases).

In order to limit use of the doctrine to serious threats to First Amendment values, this Court has issued a number of restrictions. It has frequently warned that facial invalidation for overbreadth is "strong medicine" which should be used "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. Defendants submit that

courts should be especially scrupulous in their observation of the limitations on facial invalidation for overbreadth when, as in the case before this Court, the challenge is made prior to enforcement. In these cases, the states or other authorities have had no opportunity to eliminate by enforcement or construction any potential unconstitutional applications.

In circumscribing use of the facial overbreadth doctrine, this Court has ruled that the existence of valid applications will normally save a statute from facial invalidation. *See, e.g., Parker v. Levy*, 417 U.S. 733, 760 (1974) (describing the Court's "reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied"); *Ferber*, 458 U.S. at 773 (upholding child pornography statute "whose legitimate reach dwarfs its arguably impermissible applications"). Thus, the possibility of one or several unconstitutional applications is not sufficient to invalidate a statute. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"). Every statute is probably susceptible to some unconstitutional application. This Court has said:

> "Without a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application."

New York v. Ferber, 485 U.S. at 772 n.27 (cit. omitted). *See also Broadrick*, 413 U.S. at 618 (statute upheld although it

"may be susceptible of some other improper applications"). Expressing the same principle, the Court has also suggested that potential unconstitutional applications of a state statute are not a basis for invalidation so long as the statute reaches a "central core of constitutionally regulable conduct." *Ferber*, 458 U.S. at 771 n.26. *See also Broadrick*, 413 U.S. at 615-18.

This Court has imposed two basic requirements for facial overbreadth invalidation. In *Erznoznik*, the Court held: "[A] state statute should not be deemed facially invalid unless [1] it is not readily subject to a narrowing construction by the state courts, and [2] its deterrent effect on legitimate expression is both real and substantial." 422 U.S. at 216 (cits. omitted). Note that the elements are conjunctive: both must be present in order for a state statute to be facially invalidated. *Id.* at 217. The Eleventh Circuit quoted and followed this Court's admonition that, when considering narrowing constructions, " '[t]he key to application of this principle is that the statute must be "readily susceptible" to limitation.' " 919 F.2d at 1500 (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988)).

The requirement of "substantial" overbreadth applies with particular force " 'where conduct and not merely speech is involved.' " *Broadrick*, 413 U.S. at 615, (quoted in Ferber, 458 U.S. at 770). As the Eleventh Circuit concluded minors' display laws regulate " 'conduct plus speech' " and substantial overbreadth must therefore be shown for invalidation. 919 F.2d at 1500; *accord M.S. News*, 721 F.2d at 1289.

One corollary of the above-mentioned prerequisites to facial overbreadth invalidation is that the presence of an earlier state court decision narrowing the scope of a statute is not essential to its withstanding constitutional challenge. *See Frisby v. Schultz*, 487 U.S. 474, 481-83 (1988) (construing and upholding language of municipal picketing ordinance previously unconstrued by state courts); *Cole v. Richardson*, 405 U.S. 676 (1972) (construing previously unconstrued language of a Massachusetts loyalty oath statute in a manner so as to uphold it); *Rose v. Locke*, 423 U.S. 48, 51-52 (1975) (holding that previous applications of a statue are not "a prerequisite to a statute's withstanding constitutional attack"); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1966) (refusing to invalidate on its face a New York privacy statute and stating that the Court "confidently expect[ed] that the New York courts [would] apply the statute consistently with the constitutional command"); *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1191 (9th Cir. 1988) ("If the courts of a state could adopt a construction of its statute that eliminates the constitutional defects, federal courts should defer.")

The Eleventh Circuit found "no relevant distinction" in the test for facial overbreadth invalidation and "the constitutional standards applicable to a time, place, and manner restriction." 919 F.2d at 1502. The court concluded:

> In evaluating the display ban under either test, the crucial inquiry, at least in this case, is whether the restriction on adults' access to protected speech is unnecessarily burdensome or "significant," or, stated differently, whether alternative modes of adult access are unduly restricted.

Id.

III. THE COURT OF APPEALS CORRECTLY HELD THAT, FOR REASONS EITHER UNAVAILABLE TO OR NOT RECOGNIZED BY THE DISTRICT COURT, THE ACT PLACES ONLY A MINOR BURDEN ON PROTECTED ADULT SPEECH.

The Eleventh Circuit correctly held that the Act places only a minor burden on protected adult speech. The court of appeals found the "slight burden on adults' access to protected material" to be "far less than the district court suggests." 919 F.2d at 1495, 1506. Similar conclusions have been reached by other courts reviewing minors' access laws. For example, in *M.S. News*, the Tenth Circuit concluded that "the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them." *Id.* at 1288. In support of its conclusion, the court pointed out: "[A]dults may still have some access to materials not obscene as to them, and they may purchase such material." *Id.* at 1289. And in *Upper Midwest*, the Eighth Circuit held that the Minneapolis display ordinance which it sustained did not substantially interfere with adult free speech:

> We believe that the ordinance in the instant case is one that is "carefully limited," *Miller*, 413 U.S. at 24, and that does not unduly burden the First Amendment rights of adults. *See Butler*, 352 U.S. at 383; *cf. Erznoznik*, 422 U.S. at 213. Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation and is minimal in its impact. Adults are still free to request a copy of restricted material to view from a merchant or to peruse the material in adults only bookstores or in segregated sections

> of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it. The continued availability of these materials to adults for purchase under the ordinance weighs strongly in favor of the ordinance's constitutionality.

Id. at 1395. *See also American Booksellers Ass'n v. Rendell,* 481 A.2d at 941 ("although adults may be inconvenienced in their perusal or purchase of graphic materials harmful to minors, though not obscene for adults, adult access to these materials will not significantly be impaired" and "any inhibitory effect on dissemination to adults does not render the display provision [of the Pennsylvania minors' access law] constitutionally defective, given the state's legitimate interest in shielding children from these materials").

This Court has also recognized on several occasions that for the sake of protecting minors minimal effects on protected adult speech are constitutionally acceptable. *See Bethel School District v. Fraser,* 478 U.S. 675, 684 (1986) ("This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children"); *FCC v. Pacifica Foundation,* 438 U.S. 726, 729 (1978) (plurality opinion) (upholding the power of the FCC to regulate for the protection of children a radio broadcast which was "indecent but not obscene").

In a straightforward application of *Pope v. Illinois,* 481 U.S. 497 (1987), the Eleventh Circuit held that under the Act material could not be found obscene for minors as

long as "any reasonable minor, including a seventeen-year-old, would find serious value." 919 F.2d at 1504-05. Of course, *Pope* was not available to the district court when it declared the Georgia Act unconstitutional for overbreadth. In concluding that "Georgia courts would interpret section 16-12-102 in light of *Pope*," the court of appeals cited *Hunter v. State*, 257 Ga. 571 (1987), in which the Georgia Supreme Court recognized *Pope* to be applicable to the Georgia Act. 919 F.2d at 1504. The Eleventh Circuit also followed the Fourth Circuit and Virginia Supreme Court in their understanding of the effect of *Pope*. 919 F.2d at 1504-05 (citing *American Booksellers Ass'n v. Virginia*, 882 F.2d at 127 (quoting *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 372 S.E.2d 618, 624 (1988))).

Petitioners suggest that the failure of the Georgia Supreme Court to answer a certified question seeking construction of the display provision of the Georgia Act distinguishes this case from the Virginia case and dictates that the Georgia statute be stricken as unconstitutional. For a number of reasons, petitioners' argument is invalid. Most obviously, *Pope* was not available at the time the Georgia Supreme Court was requested to construe the Act. Moreover, the Georgia Supreme Court was not asked any specific questions about the meaning of the Georgia statute but rather simply how it "construe[d] the provisions in Act 1319, 1984 Ga. Laws 1495, which have been challenged." 744 F.2d at 786. This question is far different from the specific constructions requested of the Virginia Supreme Court. As the Eleventh Circuit pointed out, the Georgia Supreme Court simply expressed its reluctance to construe the statute "in the absence of enforcement

facts, finding instead that the challenge was anticipatory." 919 F.2d at 1497. But most importantly the effect of *Pope* on the *Ginsberg*-derived definition of minors obscenity as repeated in the Georgia Act, Virginia statute, and all other minors' access laws, is not a matter of state statutory construction but rather federal constitutional law. And, as discussed above, the absence of earlier state court decisions narrowing the scope of a state statute is not fatal to constitutionality, particularly where as here the statute does not have a significant effect on protected adult speech.

As the Eleventh Circuit concluded, the burden on adult speech is also "far less than the district court suggests" when one gives full effect to the requirement of the Act that displays be made "knowingly," § 16-12-102(2), -103, before they are subject to regulation. 919 F.2d at 1506. The district court had erroneously concluded that in order to comply with the Act a bookseller would be required to review "his entire inventory" and in effect pre-screen all new purchases. 643 F.Supp. at 1553. The Eleventh Circuit properly concluded that the district court's confusion on this issue led it to overestimate the effect of the Act on adult speech. 919 F.2d at 1506. As this Court has explained, it is a statute without a knowledge or scienter element that requires a bookseller "to make himself aware of the contents of every book in his shop." *Smith v. California*, 361 U.S. 147, 153-54 (1959) (striking a Los Angeles obscenity ordinance containing no scienter element and thus imposing strict liability).[4]

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[4] Although the prosecution need not prove knowledge that materials are obscene, this Court has consistently held that

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Defendants maintain that in view of the minimal burden on adult speech as is evident from the application of *Pope* and the Act's scienter requirement, the consideration of narrowing constructions is unnecessary. In *Erznoznik*, this Court held that, regardless of the ready availability of narrowing constructions, a state statute may not be invalidated for facial overbreadth unless "its deterrent effect on legitimate expression is both real and substantial." 422 U.S. at 216.

Assuming, however, the necessity of considering narrowing constructions of the Georgia Act, it is manifest that the Eleventh Circuit properly recognized the use of blinder racks to be a nonburdensome manner of compliance. Although more onerous methods of compliance can be imagined, just as hypothetical unconstitutional applications of any statute can be imagined, the court concluded that "blinder racks do not 'exhibit, expose, or display in public' material subject to section 16-12-103(e)." 919 F.2d at 1508. In reaching this result, the court applied the ordinary meanings of the words of the Act. The court of appeals further concluded:

> Therefore, under our reading of section 16-12-103(e), it is not necessary that booksellers physically segregate material placed behind

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no one may be convicted of an obscenity offense unless he is aware of the "contents[,] . . . character and nature of the materials." *Hamling v. United States*, 418 U.S. 87, 123 (1974). Just as in all other states, obscenity statutes in Georgia are applied consistently with this constitutional requirement. *See Sewell v. State*, 238 Ga. 495, 496 (1977), *app. dism.*, 435 U.S. 982 (1978), *citing Hamling*, 418 U.S. 87.

> blinder racks from material accessible to minors. Since the statute is "readily susceptible" to such a reading, we need not consider broader interpretations of the requirements for compliance with section 16-12-103(e). *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. at 397-99, 108 S. Ct. at 645 (1988). Placing the relatively small amount of reading materials subject to section 16-12-103 behind blinder racks only slightly burdens adults' access to such material. Blinder racks do not impose a "substantially overbroad" regulation on "conduct plus speech." (See the discussion above at pp. 1499-1500, 1502). Adults may peruse and purchase the material without restriction. Under either the balancing test for regulations on material protected to one group but not another, or the test for the constitutionality of a time, place, and manner regulation, (see the discussion above p. 1502), the burden on adults' access to material protected as to them is constitutionally insignificant and therefore permissible. *See M.S. News*, 721 F.2d at 1288-89 (relying in part on blinder racks exception to uphold statute against facial challenge).

919 F.2d at 1508-09. Plaintiffs have argued that recognition of a readily available construction under which the use of blinder racks avoids a "display in public" constitutes rewriting the Act. This argument is obviously fallacious.

The Eleventh Circuit decision this Court is asked to review is fully consistent with all other pertinent circuit decisions. The Fourth, Eighth, and Tenth Circuits have upheld minors' access laws against facial overbreadth challenges. *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989); *Upper Midwest Booksellers Ass'n v.*

Minneapolis, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288 (10th Cir. 1983).

The dissent below by District Judge Pointer to the majority's view of the overbreadth issue was based on a misunderstanding of the Act. Although District Judge Pointer agreed "we should assume that Georgia would adopt a narrow construction of the section," he concluded that the Act would have a broader affect on adult speech than the majority found because, according to Judge Pointer, the Act regulates matter that "contains" explicit material. 919 F.2d at 1515. Judge Pointer apparently failed to understand that the Act, although some of its provisions overlap, only regulates material that "taken as a whole" satisfies the prurience and lack of serious value elements. Ga. Code Ann. § 16-12-102(1)(A), (C). It is significant that even the district court recognized that no material is subject to regulation under the Act unless "taken as a whole" it satisfies the definition of "harmful to minors." 590 F.Supp. at 688. Evidently realizing Judge Pointer's misunderstanding of this aspect of the Act, petitioners do not suggest to this Court that Judge Pointer's analysis of the overbreadth issue should prevail.

Plaintiffs do, however, make a curious argument against the constitutionality of the display provision of the Act. They propose that the "harmful to minors" definition in the Act be interpreted to regulate "material deemed 'harmful' to *any* minor." (Petition at 19) (emphasis in original). Plaintiffs thus propose that the Act be construed to regulate material which, meeting the other prongs of the obscenity test, also lacks serious value

for a five year old child. If the Act required this construction, defendants would concede its unconstitutionality. As the Eleventh Circuit recognized, however, the Act does not require such a contrived construction. In effect, plaintiffs argue that the Act should be construed in isolation from *Pope*, without regard to the Act's scienter requirement, and without recognition of obvious narrowing constructions, in order that it may be held unconstitutional. (Petition at 15). Although ambivalent on the point, plaintiffs complain to this Court that under the Eleventh Circuit decision the Act is "a duplicative and meaningless statute which encompasses little or nothing more than that covered by Georgia's general obscenity laws." (Petition at 17). Of course, the states are not forbidden by the Constitution from enacting laws having no significant effect on private conduct. And plaintiffs' "open season" view that state laws should be broadly construed for the purpose of striking them is in derogation of all precedent and reason.

IV. THE COURT OF APPEALS DID NOT ERR IN UPHOLDING THE LIBRARY EXEMPTION UNDER THE RATIONAL BASIS TEST OF EQUAL PROTECTION.

The Act contains in § 16-12-104 an exemption for public and school libraries. The Eleventh Circuit correctly held that this legislative classification is not subject to strict scrutiny under the Equal Protection Clause. 919 F.2d at 1509. The court then correctly held that the library exemption does not violate the Equal Protection Clause because it is rationally related to the states' legitimate interest in controlling the commercial distribution and

display to minors of obscene materials and the states' legitimate interest in protecting educational uses of explicit materials. 919 F.2d at 1511-13.[5] *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973) (recognizing "legitimate state interests at stake in stemming the tide of commercialized obscenity").

In a 1988 decision, this Court emphasized the difficulty of a successful equal protection challenge to a legislative classification. In *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2236 (1988), the Court held:

> Legislative classifications, however, are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute: "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. [cit. omitted] In a case such as this, the plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one. [cit. omitted]

Id. at 2236 (emphasis in original).

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[5] The Eleventh Circuit also noted a Seventh Circuit suggestion that library exemptions to obscenity statutes may "serve the purpose of shielding libraries from groundless complaints that they are disseminating obscene materials." 919 F.2d at 1511 n.38 (citing *Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir. 1990)).

It is important to understand that almost all obscenity statutes contain exemptions, defenses, or presumption exceptions applying to various classes of persons, institutions, organizations, and categories of activities. Such measures are found in adult obscenity statutes, minors' access laws, child pornography statutes, and other obscenity regulations. A number of states provide exemptions or defenses for such educational uses as represented by libraries, schools, and universities. Although libraries are probably included in all educational exemptions and defenses, obscenity statutes of 32 states recognize specific exemptions for libraries.[6] If strict scrutiny is to be applied to all of these

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[6] Ark. Stat. Ann. § 5-68-308(c) (1987); Colo. Rev. Stat. § 18-7-503(1)(a) (1990); Del. Code Ann. tit. 11, § 1365(k)(3) (1987); Ga. Code Ann. § 16-12-104 (1988); Idaho Code §§ 18-1517(1)(d), -4102(B) (1987); Ill. Rev. Stat. ch. 38, §§ 11-20.1(b)(2), 11-21(e)(1) (1979 & Supp. 1990); Ind. Code Ann. § 35-49-3-4(2) (Burns 1985); Iowa Code Ann. § 728.7 (1979); Kan. Stat. Ann. §§ 21-4301(4)(b), -4301a(2)(b), -4301a(2)(c), -4301a(2)(d) (1988); La. Rev. Stat. Ann. § 14:106(D)(1) (West 1986); Me. Rev. Stat. Ann. tit. 17, § 2911(2)(A) (1983 & Supp. 1990); Mass. Ann. Laws ch. 272, §§ 28, 28C, 29B(e) (Law Co-op. 1980 & Supp. 1991); Mich. Comp. Laws Ann. §§ 752.367(a)(ii), 722.676(d) (1991 & Supp. 1990); Minn. Stat. Ann. § 617.295(a) (West 1987); Miss. Code Ann. § 97-29-107(1)(c) (Supp. 1990); Neb. Rev. Stat. §§ 28-810(4), -815(1) (1989); Nev. Rev. Stat. Ann. § 201.237 (1986); N.H. Rev. Stat. Ann. § 649-A:4 (1986); N.M. Stat. Ann. § 30-37-5.D (1989); N.Y. Penal Law §§ 235.10, 263.20(2) (McKinney 1989); N.C. Gen. Stat. §§ 14-190.15(c) (2) (1986); N.C. Gen. Stat. § 19-20(b)(3) (1983); N.D. Cent. Code §§ 12.1-27.1-03.1(2)(c), -27.1-11, -27.2-05(2) (1985 & Supp. 1989);

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statutes, the courts have much work to do. As everyone knows, strict scrutiny is "strict in theory and fatal in fact."

In applying the rational basis test of equal protection to the library exemption, the Eleventh Circuit followed the overwhelming preponderance of authority. If this case involved fully protected First Amendment interests, a strict scrutiny standard would certainly be appropriate.[7] *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Except in a very few cases, strict scrutiny has not been applied in equal protection review of regulations of any category of

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Ohio Rev. Code Ann. §§ 2907.32(B), .321(B)(1), .322(B)(1), .323(A) (Anderson Supp. 1990); Or. Rev. Stat. §§ 167.085(2), .089 (1990); S.C. Code Ann. § 16-15-385(c)(2) (Law Co-op. Supp. 1990); S.D. Codified Laws Ann. §§ 22-24-31(4), -37(2) (1988); Utah Code Ann. §§ 76-10-1224, -1226 (1990 & Supp. 1990); Vt. Stat. Ann. tit. 13, § 2805(b)(3), (c)(3) (Supp. 1990); Va. Code Ann. §§ 18.2-383(1), -391.1(1) (1988); Wash. Rev. Code §§ 9.68.015, 9.68.100 (1988); Wis. Stat. Ann. § 944.21(8)(a), (b)(5) (Supp. 1990); Wyo. Stat. § 6-4-302(c)(ii)(1988).

The Model Penal Code contains an affirmative defense if "dissemination was restricted to . . . . institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material." Model Penal Code Sec. 251.4(3)(a) (Proposed Official Draft 1962). A number of the above-cited statutes also incorporate this provision.

[7] On page 23 of the petition, plaintiffs misstate that "the State itself conceded that if the display proscription affects First Amendment protections, strict scrutiny would be applicable and the exemption would be unconstitutional." Defendants never made any statement resembling this in any of the lower court briefs.

obscene materials. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the Court's plurality opinion appears to apply a reasonable basis test to a zoning regulation of erotic, but non-obscene, material. *Id.* at 71-72. *See also Hart Book Stores v. Edmisten*, 612 F.2d 821, 831 n.13 (4th Cir. 1979) ("The *Mini Theatres* plurality apparently considered that classification of sexually explicit materials would invoke only minimal scrutiny, 427 U.S. at 70-73.") In *Kucharek v. Hanaway*,. 902 F.2d 513 (7th Cir. 1990), the Seventh Circuit applied the rational basis test of equal protection in upholding an exemption to a Wisconsin obscenity statute for libraries, schools, and contract printers. *Id.* at 520-21. The Ninth Circuit has reached a similar conclusion. In *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989), the Ninth Circuit applied the rational basis test and rejected an equal protection challenge to an exemption to both adult obscenity and minors' access provisions in an Arizona statute. *Id.* at 1050.

The Tenth Circuit has reached the same conclusion. In *M.S. News*, 721 F.2d 1281, that court employed the rationality test in upholding an exemption in a Wichita minors' access law for noncommercial displays or distributions. The Tenth Circuit convincingly pointed out the different incentives involved in commercial and non-commercial uses of covered materials:

> Commercial enterprises have the economic incentive to make sales and are therefore more likely to press the display and dissemination of material harmful to minors. Hence making a distinction between commercial and noncommercial enterprises is sufficiently grounded in a legitimate state interest.

Id. at 1291-92. Although the Georgia Act does not exempt as many non-commercial uses as the Wichita ordinance, the Eleventh Circuit correctly recognized that its library exemption does in fact distinguish commercial from non-commercial uses. 919 F.2d at 1511. Moreover, in *Piepenburg v. Cutler*, 649 F.2d 783 (10th Cir. 1981), the Tenth Circuit upheld an affirmative defense in a Utah obscenity statute for educational and similar uses. *Id.* at 785-87.

Numerous other lower court decisions have reached the same conclusion. *See e.g., American Booksellers Ass'n v. Rendell*, 481 A.2d 919, 942 (Pa. Super. 1984); *Long v. 130 Market St. Gift & Novelty*, 440 A.2d 517, 523-24 (Pa. Super. 1982).

Plaintiffs cite the Eighth Circuit's decision in *Upper Midwest*, 780 F.2d 1389, as creating a circuit conflict on equal protection review of exemptions to obscenity statutes. (Petition at 25 n.5). In *Upper Midwest*, the district court applied strict scrutiny in striking exemptions to a Minneapolis minors' access ordinance for libraries, schools, and several other categories of institutions and individuals. The district court held, however, that the remainder of the ordinance was constitutional and severable. The district court's use of strict scrutiny to strike the exemptions was not appealed to or reviewed by the Eighth Circuit. 780 F.2d at 1391. Noting that the exempted uses were probably already protected through the serious value prong of the obscenity test, the Eighth Circuit did review and uphold the district court's decision on severability. *Id.* at 1398-99. Thus, the Eighth Circuit's decision does not create a circuit conflict. As is evident from the above discussion, all recent circuit decisions have applied

the rational basis test in upholding exemptions and defenses similar to that presented here.

It would indeed be anomalous to strike on equal protection grounds exemptions and defenses for educational and non-commercial uses of sexually explicit material. This would result in the criminalization of more speech than the Georgia Legislature has chose to criminalize. As the Eleventh Circuit stated, "Finally, striking down such an exemption would hinder rather than promote robust speech." 919 F.2d at 1512. *See also Ripplinger*, 868 F.2d at 1050 (striking an obscenity statute exemption "would not serve the first amendment policy of encouraging and furthering free expression"); *Kucharek*, 902 F.2d at 520 (noting the curiosity of challenging an exemption on the ground of its "leniency").

CONCLUSION

For the above-stated reasons, the Court should deny plaintiffs' petition. As concluded by the Eleventh Circuit, the Georgia minors' access law, when understood in light of this Court's decision in *Pope*, the scienter provision, and readily available narrowing constructions, has only an incidental and minimal effect on protected adult speech. This effect is not substantial and not a basis for facial overbreadth invalidation. As the Fourth, Eighth, Tenth and now Eleventh Circuits have recognized, minors' access laws at most work a slight inconvenience to a limited amount of adult speech while preserving ultimate access by adults. Moreover the decision by the

Georgia legislature to protect public libraries from obscenity prosecutions is eminently rational and not in conflict with the Equal Protection Clause. This conclusion by the Eleventh Circuit is also consistent with all pertinent decisions of other circuits.

Respectfully submitted,

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